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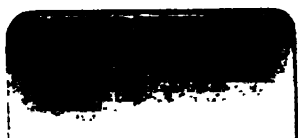
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AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. XXVII.

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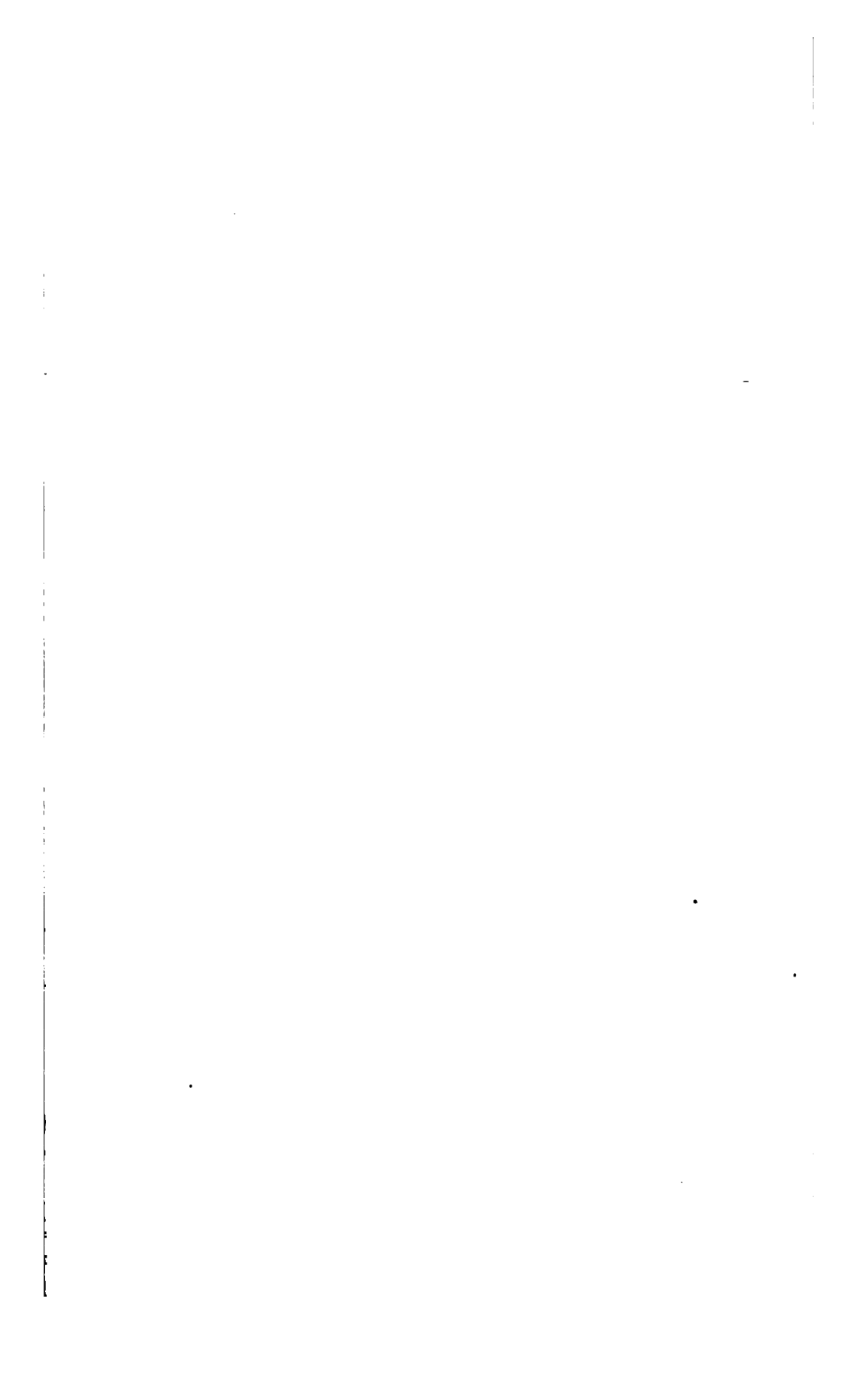
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CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

ROSS V. HURD.

(71 N. Y. 14.)

Promissory note — waiver of protest after dishonor.

Before the maturity of a promissory note the holder and the accommodation indorser had some conversation about extending the time of payment ; but no arrangement was made. The note was not presented for payment at maturity. Afterward the holder and the maker went to the indorser to arrange for an extension, the maker then asked the holder if he desired a new note, and he replied that if it was agreed to, he would let the note stand as it was. The indorser said, "then I will waive protest," and the holder thereupon agreed to the extension. *Held*, in an action on the note against the indorser, that this would warrant a finding that the indorser understandingly agreed to continue to be liable, and a nonsuit was erroneous.

ACTION on promissory note against the indorser. The plaintiff was nonsuited, and judgment on verdict was directed by the General Term, and the plaintiff appealed. The opinion states the facts.

J. McGuire, for appellant.

E. Countryman, for respondent. The liability of an indorser who has been discharged by want of presentment and notice, can

only be revived by an express promise to the holder to pay the note, with full knowledge of the facts. *Tebbets v. Dowd*, 23 Wend. 379; *Meyer v. Hibsher*, 47 N. Y. 265; Story on Prom. Notes [5th ed.], 360-363, § 289; *Borradile v. Lowe*, 4 Taunt. 93; *Thornton v. Wynn*, 12 Wheat. 183; 3 Kent's Com. [10th ed.] 162, 163; *Creamer v. Perry*, 17 Pick. 332-335; *Oswego Bank v. Knowler*, H. & D. 122.

ANDREWS, J. There was no demand or notice of non-payment of the note when it became due, and the plaintiff was not relieved from the necessity of making a demand and giving notice, by what occurred between the plaintiff and the defendant, at the interview on the first or second day of November, 1872, before the maturity of the note.

The evidence is that Kingsbury, the maker of the note, a few days before that time, has applied to the plaintiff to extend the time of payment ninety days, and the plaintiffs consented to do so, if the note was kept good and secure. The plaintiff afterward went to the bank and had the interview spoken of with defendant. He informed the defendant of what had occurred between him and Kingsbury, and stated that he had come to make some arrangement with regard to the note. The plaintiff testifies: "I stated to him (Hurd) that I could let him (Kingsbury) have the money longer, if he kept it well secured or kept the note good (I don't recollect the exact words I used to him); and he said he guessed that could be fixed, and he would get Kingsbury in, or I was to, and I went out to look for him." The plaintiff then left the bank to find Kingsbury, but did not find him, and later in the afternoon returned to the bank to see the defendant; but, not finding him there, went away and did not see him again until after the note fell due. It is inferable, from this evidence, that the defendant was willing to continue his liability as indorser, but it was left to be arranged at an interview to be had between all the parties. There was no request by Hurd that the plaintiff would extend the time of payment of the note, nor was any thing said by him which would justify the plaintiff in believing that he would dispense with demand and notice, or which was calculated to mislead the plaintiff. The conversation clearly contemplated a new and substituted arrangement to be made before the note matured for continuing the loan. The plaintiff, therefore, was not entitled to recover, on the theory that this transaction dispensed with the necessity of protest. It is quite

evident, however, that the plaintiff either did not understand that demand and notice was necessary to charge an indorser, or supposed that what occurred between him and the indorser, on this occasion, made a protest unnecessary. He waited until the expiration of the second ninety days, and then went to the bank, with Kingsbury, and had a second interview with Hurd; and the liability of Hurd, in this action, depends upon what took place on that occasion. Kingsbury desired a still further extension of ninety days, and he procured from the bank (the defendant, Hurd, counting out the money for him) the sum necessary to pay the interest on the note to that time, and paid it to the plaintiff; and the plaintiff then spoke to Hurd about the extension of time, and Hurd replied: "You and Kingsbury can fix that about as you are a mind to." The testimony proceeds as follows: "he (Kingsbury) asked how I (plaintiff) would fix it; whether I would have a new note, or what; and I told him if both parties agreed I would let the note stand just as it was; and Hurd turned around from us, and said, then I will waive protest." This closed the conversation, and the plaintiff left the bank, and waited until the expiration of ninety days from that time, when he called upon the defendant, and informed him that the note was due, and that he would have to collect it; and soon after, the defendant claimed that the note had not been protested, and declined to pay it.

Upon these facts the question is presented, whether the nonsuit was properly granted. When the parties met at the bank, on the second occasion referred to, Hurd had been discharged from his liability as indorser, by the neglect of the plaintiff to take the steps necessary to fix his liability. But it was competent for the defendant to waive the objection arising from the plaintiff's laches, and to renew and continue his liability as indorser, and debar himself from setting up, when sued on the note, the want of protest as a defense. If an indorser, with full knowledge of the laches of the holder in neglecting to protest a note or bill, unequivocally assents to continue his liability, or to be responsible, as though due protest had been made, he is held to have waived the right to object, and will stand in the same position as if he had been regularly charged by presentment, demand and notice. This assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language. It has been frequently held that a promise by the indorser to pay the note or bill, after he has been discharged,

by the failure to protest it, will bind the indorser, provided he had full knowledge of the laches when the promise was made. *Trimble v. Thorne*, 16 Johns. 152; Story on Prom. Notes, §§ 359, 362, and cases cited. A promise, made under these circumstances, affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder; and the law, without any new consideration moving between the parties, gives effect to the promise. The assent of the indorser to be bound, notwithstanding he has not been duly charged, may be established by any transaction between him and the holder, which clearly indicates this purpose and intention. In *Duryee v. Dennison*, 5 Johns. 248, the action was against an indorser who had not been regularly charged by demand and notice. No demand of payment was made until the day after the note became due. To avoid the defense based on this ground, it was shown that, after the note became due, the attorney for the plaintiff called on the defendant and informed him of the non-payment by the maker, and that the plaintiff looked to him for payment. The defendant was told at the same time that the demand and notice was irregular but the defendant "agreed to consider the demand and notice as made in due time, and himself liable as indorser." The court held that this was equivalent to a promise of payment, and authorized a verdict for the plaintiff. KENT, C. J., said: "We are of the opinion that the testimony of Aiken, as given at the trial, was sufficient to support the verdict. The law is now settled that if an indorser has not had regular notice of non-payment by the drawer, yet if, with knowledge of that fact, he makes a subsequent promise to pay, it is a waiver of the want of due notice, and assumpsit will lie."

In the case at bar, we think the jury would have been authorized to find that the defendant, with knowledge of the fact that the note had not been protested, consented to be liable as indorser upon the note, and that his indorsement should stand as security to the plaintiff; and also the further fact that the plaintiff, in consideration of this consent, agreed to extend the time of payment of the note, and that such consent was given to induce such extension, without exacting a new security. In construing the transaction, the jury were entitled to consider the surrounding circumstances. The defendant was a banker, and familiar, as may be presumed, with the rules regarding the protest of commercial paper. His words, "I will waive the protest, then," had no significance, unless

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they were intended to remove the objection arising from the prior laches of the holder, in neglecting to protest the note at maturity. He intended, as is manifest, to continue his liability as indorser for the security of the plaintiff. He seemed to be willing to become obligated on a new instrument, or to renew his liability on the old one, as the plaintiff and Kingsbury should arrange. And the plain inference from the conversation is, that the plaintiff consented to let the old note stand, on consideration that the defendant continued liable thereon; and the defendant's declaration could mean nothing less than that he would make no question as to the protest of the note, or as to his liability as an indorser. This case is stronger in reason, for holding the indorser, than where there is a simple promise to pay after maturity. The transaction here, not only indicates an intention on the part of the indorser to remain bound notwithstanding his discharge, but the waiver of the laches of the plaintiff was the consideration of the extension, given by the plaintiff to the maker.

The nonsuit was improperly granted, and the judgment should be reversed, and a new trial ordered.

All concur, except FOLGER and MILLER, JJ., absent.

Judgment reversed.

CAMPBELL V. SMITH.

(71 N. Y. 26.)

Mortgage — assumption of, by grantee.

H. delivered to B., a deed, in blank as to the grantee's name, with recital that the amount of a mortgage on the premises was deducted from the consideration, and that the deed was subject thereto, and a covenant by the grantee to pay it. The grantor having authorized B. to insert any name as grantee, B., with defendant's knowledge and assent, inserted defendant's name, and recorded the deed, agreeing that any profits arising from a sale of the premises should be applied on an indebtedness of B. to the defendant's firm. The defendant afterward conveyed the premises; the plaintiff foreclosed the mortgage without making defendant a party, and a deficiency arising, brought this action to recover upon the covenant. *Held*, that defendant by consenting to the insertion of his name as grantee, assumed the position and liability of a purchaser from the grantor, and was liable on the covenant, and that the arrangement with B., being collateral, did not affect H. or the plaintiff.*

* See *Fiske v. Tolman* (124 Mass. 254), 26 Am. Rep. 659, note, 660.

ACTION on covenant by defendant to pay a mortgage on the granted premises, the deed reciting that it was subject thereto, and that the amount of the mortgage had been deducted from the purchase-price. The deed, executed by Hood, was delivered to Burtis with the grantee's name blank, with authority to Burtis to insert any name. Burtis being indebted to the defendant's firm, inserted his name and recorded the deed, with his knowledge and assent, with the agreement that any profits from a sale of the premises should be applied on that indebtedness. The defendant subsequently conveyed the premises, and the plaintiff foreclosed the mortgage without making him a party, and a deficiency arose. The defendant had judgment, which was reversed at General Term, and he appealed.

D. P. Barnard, for appellant. Defendant was not a purchaser. *Lawrence v. Fox*, 20 N. Y. 268; *Hartley v. Harrison*, 24 id. 170; *Burr v. Beers*, id. 178; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Garnsey v. Rogers*, 47 id. 233; s. c., 7 Am. Rep. 440.

J. T. Marean, for respondent.

CHURCH, C. J. We concur with the General Term that the case of *Garnsey v. Rogers*, 47 N. Y. 233, is not controlling in favor of the defendant. In that case a debtor conveyed to his creditor certain premises by deed as security for his debt, and it was held that an agreement in the deed that the creditor would pay a prior incumbrance was for the benefit and protection of the debtor, and did not inure to the benefit of the holder of the incumbrance, within *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases; and that upon the payment of the debt, and a reconveyance of the premises to the debtor, with the assumption upon the part of the latter of the incumbrance, the creditor was released from all obligation upon his covenant in the deed. Here no such relation existed between Hood, the grantor, and the defendant. The former conveyed absolutely all her interests in the premises, and the defendant, by consenting to the insertion of his name as grantee and accepting the conveyance, occupied the position of purchaser. As between them the relation of grantor and grantee existed, with all the rights and obligations incident to that position. The covenant to pay the mortgage was absolute, and the mortgagee had the right to

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enforce it. The principle that when A, for a valuable consideration, agrees with B to pay his debt to C, the latter can enforce the contract against A, has been repeatedly adjudicated, and is applicable to the transaction developed in this case. *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Ricard v. Sanderson*, 41 id. 179; *Thorp v. Keokuk Coal Co.*, 48 id. 253.

The transaction with Burtis did not impair the right of Hood, nor the plaintiff as assignee of the mortgagee. That was an arrangement collateral to the deed, and affected only the parties to it. The relative rights of Burtis and the defendant are not involved in this action. The defendant consented to occupy the position of grantee in the deed, under an agreement with Burtis, which cannot affect the plaintiff.

[Omitting minor points.]

The judgment must be affirmed.

All concur.

Judgment affirmed.

SPALDING V. ROSA.

(71 N. Y. 40.)

Contract for services — excuse for non-performance — illness.

The defendants agreed with the plaintiffs, proprietors of a theater, to furnish the "Wachtel Opera Troupe," to give a number of performances in their theater, the receipts to be divided in a specified manner. Wachtel, from whom the company took its name, and by whose name it was known, was the leader and chief attraction, and his connection with the company was the inducement that led the plaintiffs to make the agreement. Wachtel became unable to sing in consequence of illness, and the defendants consequently did not furnish the troupe. In an action for breach of the agreement, *held*, that Wachtel's appearance was the principal thing contracted for, and was of the essence of the contract; that plaintiff would not have been bound to accept the services of the company without him; and that his sickness and inability to sing constituted a good excuse for non-performance of the agreement.

ACTION for breach of contract. The plaintiffs were owners of the Olympic theater, in St. Louis. The defendants agreed with them to furnish the "Wachtel Opera Troupe" for a specified

number of performances in their theater, the receipts to be divided in specified proportions. Wachtel felt sick and was unable to perform at all, and consequently the defendants did not furnish the troupe. The other facts are in the opinion. The complaint was dismissed; this was affirmed at General Term, and the plaintiffs appealed.

P. Cantine, for appellants. The sickness of Wachtel did not excuse the breach. *Williams v. Vanderbilt*, 28 N. Y. 218; *White v. Mann*, 26 Me. 361; *Chapman v. Dalton*, Plowden, 284; 2 Pars. on Cont. 185; *Gray v. Murray*, 3 Johns. Ch. 167; 1 MacQ. H. of L. Cas. 668; *Gilpins v. Consequa*, 1 Pet. C. C. 91; *Youqua v. Nixon*, id. 221; *Paradine v. Jane*, Aleyn, 26, 27; Story on Bail., § 36, and notes; *Rowland v. Phalan*, 1 Bosw. 43, 52, 57; *Wolfe v. Howe*, 20 N. Y. 197, 203; *Clark v. Gilbert*, 26 id. 279, 283, 284; *Allen v. McKibbin*, 5 Mich. 449; *Patrick v. Putnam*, 27 Vt. 759; *Chase v. Barrett*, 4 Paige, 161, 162; *Blacksmith v. Fellows*, 3 Seld. 416; *Beebe v. Johnson*, 19 Wend. 500; *Harmony v. Bingham*, 2 Kern. 99, 107, 115; *Clark v. Glasgow As. Co.*, 1 MacQ. Scotch App. Cas. 668; *West v. Steamer Uncle Sam*, McAl. (Cal.) 505; *Jemison v. McDaniel*, 25 Miss. 83; *Bunn v. Prather*, 21 Ill. 217; *M. D. Foundry v. Hovey*, 21 Mass. 430, 431; *Davis v. Smith*, 15 Mo. 467; *Hand v. Baynes*, 4 Whart. 213; *Dwight v. Williams*, 4 McL. 581; *The Harriman*, 9 Wald. 172; 1 Pars. on Cont. 86, 94.

Erastus Cooke, for respondents.

ALLEN, J. The contract of the defendants was for four performances per week for two weeks, commencing on the 26th or 27th of February, 1872, by the "Wachtel Opera Troupe," at the plaintiffs' theater in St. Louis.

The "Wachtel Opera Troupe" was well known by its name as the company at the time of making the contract, performing in operas, under temporary engagements, at the principal theaters and opera houses in the larger cities of the United States, and composed of Wachtel as the leader and chief attraction, and from whom the company took its name, and those associated with him in different capacities, and taking the different parts in the operatic exhibitions for which they were engaged. The proof of the fact that there was a troupe or company known by that name, was

competent, as showing what particular company was in the minds of the contracting parties, and intended, by the terms used; and as there was no controversy upon this subject, and no ambiguity arising out of the extrinsic evidence, there was no question of fact for the jury.

Wachtel had acquired a reputation in this country as well as in Europe, as a tenor singer of superior excellence; and, in the language of the witnesses, had made a "decided hit" in his professional performances here. It was his name and capabilities that gave character to the company, and constituted its chief attraction to connoisseurs and lovers of music, filling the houses in which he appeared. His connection with the company was the inducement to the plaintiffs to enter into the contract, and give the troupe eighty per centum of the gross receipts of the houses, one-half of which went to Wachtel. Both the plaintiffs testified that it was Wachtel's popularity, and capabilities as a singer, upon which they relied to fill their theater and re-imburse themselves for their expenses and make a profit. The appearance of Wachtel in the operas was the principal thing contracted for, and the presence of the others of the company was but incidental to the employment and appearance of the "famous German tenor." The place of any other member of the company could have been supplied, but not so of Wachtel. His presence was of the essence of the contract, and his part in the performances could not be performed by a deputy or any substitute. The plaintiffs would not have been bound to accept, and would not have accepted the services of the troupe under the contract without Wachtel; it would not have been the "Wachtel Opera Troupe" contracted for without him. There is no dispute as to the facts. The only question is one of law, as to the effect of the sickness, and consequent inability of Wachtel to fulfill the engagement, upon the obligations of the defendants. So far as this question is concerned, it must be treated as if the contract was for the performance by Wachtel alone; as if he was the sole performer contracted for. This follows from the conceded fact that his presence was indispensable to the performance of the services agreed to be rendered by the entire company. In this view of the case, the legal question is very easy of solution, and can receive but one answer. The sickness and inability of Wachtel occurring without the fault of the defendants constitutes a valid excuse for the non-performance of the contract. Contracts of

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this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not, in their nature, of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform becomes extinguished. This is so well settled by authority that it is unnecessary to do more than refer to a few of the authorities directly in point. *People v. Manning*, 8 Cow. 297; *Jones v. Judd*, 4 N. Y. 411; *Clark v. Gilbert*, 26 id. 279; *Wolfe v. Howes*, 24 Barb. 174, 666; 20 N. Y. 197; *Gray v. Murray*, 3 Johns. Ch. 167; *Robinson v. Davison*, L. R., 6 Excheq. 269; *Boast v. Firth*, L. R., 4 Com. Pleas, 1. The same principle was applied in *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415, and for the same reasons, to a contract for the delivery of a quantity of specified cotton destroyed by fire, without the fault of the vendor, intermediate the time of making the executory contract of sale and the time for the delivery.

The judgment must be affirmed.

All concur, except FOLGER, J., absent.

Judgment affirmed.

WARD V. ATLANTIC AND PACIFIC TELEGRAPH CO.

(71 N. Y. 81.)

Telegraph company — liability for injury by breaking of pole.

A telegraph company, having a right to place its line in a public street, is bound only to reasonable care; can be made responsible for an injury occurring from the breaking of one of its poles, only by proof of culpable negligence in the construction or maintenance of the line; and is not bound so to construct or maintain the line as to guard against storms of unusual severity, the occurrence of which could not reasonably be expected.

ACTION for damages sustained by plaintiff's intestate by the fall of one of the defendant's telegraph poles in a street in

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Brooklyn. Judgment on verdict was affirmed, and defendant appealed.

Everett P. Wheeler, for appellant.

Wm. W. Goodrich, for respondent. Defendant was bound to put up its poles so as to withstand such storms as are liable to occur in this climate. *Miller v. St. Nav. Co.*, 10 N. Y. 431; *Mayor, etc., v. Bailey*, 2 Den. 433.

EARL, J. The defendant had the right to place its line in the street, and hence it can be made responsible for the accident only by proof of culpable negligence on its part, either in the construction of the line or its maintenance. If the post which broke and fell was originally not reasonably sufficient, or if it was permitted carelessly to become and be insufficient by decay, then responsibility attaches to the defendant for the accident.

The plaintiff claimed, on the trial, that there was some evidence that the post was originally insufficient; and, also, that it became so by decay; and the judge submitted to the jury the evidence upon both points.

The plaintiff testified that on Sunday, the day before the accident, it was very stormy; that there was rain, snow and sleet; that the wires were thick with frozen snow and sleet, and consequently hung down quite low; more than usual. Other witnesses for plaintiff testified to the same facts, and that the wires were covered thick with wet snow, and all broken by the weight thereof, but one. Heemstone, a witness for defendant, testified that the storm commenced Saturday night, and continued all Sunday; that it was a wet snow storm, and the snow clung to the wires; that he had been in the telegraph business for thirteen or fourteen years, and that this was the worst storm on wires he ever saw; that he never knew a snow storm to break down wires before; that the storm broke down the line almost entirely in New York and Brooklyn, and in a great many other places, and destroyed the means of communication for miles around; that it also broke down the wires of other companies, and with all the force the company could command, it took about a week to repair the line. Drowne, another witness for the defendant, testified that he had been a repairer of telegraph lines for sixteen years, and that he never saw a storm which compared with this in its effect upon the wires; that there

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had been previous storms of sleet that had done as much injury to the wires as this ; but not storms of snow ; and that storms of such severity do not often happen. And another witness in the employ of the Western Union Telegraph Company testified that the storm was of unusual violence, and prostrated a great many poles. There was also evidence on the part of the defendant, that this line was properly constructed ; that the wires and posts were of sufficient strength. Upon this evidence the judge instructed the jury that the defendant was bound to construct its line so as not to endanger the public safety ; that it was not exempted from responsibility because this accident occurred in consequence of a violent storm ; that it was its duty to put up its poles in such a manner as would stand the violence of such storms as are likely to occur in this climate ; that he was not aware of any thing that occurred in reference to this storm that exempted it from responsibility on this account, and he also charged the jury in reference to the negligent maintenance of the line and posts. At the close of the charge, defendant's counsel requested him to charge, among other things, "that the defendant was not bound so to make or manage the line as to guard against storms of unusual severity, the occurrence of which could not be reasonably expected," and he declined the request and defendant's counsel excepted. In this, we think, the learned judge committed an error. The jury could have found from the evidence that this was a storm of unusual severity, which could not reasonably have been expected, and they could have found that this line, as originally constructed, was sufficient for such storms as could have been reasonably expected. Such findings would have exempted the defendant from any charge that its line was not properly constructed. *Bellinger v. N. Y. C. R. R. Co.*, 23 N. Y. 42 ; *Mayor, etc. v. Bailey*, 2 Denio, 433. The defendant is not absolutely bound to make it a line safe to the public, to have its posts in the street so strong and secure that they cannot be blown down or broken by any storm. It does not insure the safety of travellers in the streets from injuries by its posts lawfully placed there. It is bound to use reasonable care in the construction and maintenance of its line, so that no traveller shall be injured by it, and the amount of care must be proportioned to the amount of danger and the liability to accident. The poles must be strong enough to withstand such violent storms as may be reasonably expected, but they are not required to be so strong that no

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storm can break them, or to withstand such storms as reasonable foresight and prudence could not anticipate.

It cannot be said that this request was fairly covered by the charge as made. On the contrary, the tenor of the charge was such as to make the request highly proper.

It may well be doubted whether there was any evidence to be submitted to the jury, tending to show that this post and the line were not originally sufficient; but, for reasons above stated, the judgment must be reversed and new trial granted.

All concur, except CHURCH, C. J., not voting; FOLGER and MILLER, JJ., absent.

Judgment reversed.

 WHITE V. MILLER.

(71 N. Y. 118.)

Implied warranty on sale of garden seeds—measure of damages—evidence—declaration of agent.

The defendants, a corporation, were growers of garden seeds for sale, and the plaintiffs, to the knowledge of defendants, were market gardeners, who raised vegetables for sale. In 1867 the plaintiffs bought of the defendants large Bristol cabbage seed, which produced Bristol cabbage. In the fall of 1867, Miller, one of defendants' trustees, informed plaintiffs that defendants had that year raised the same kind of seed, and solicited them to purchase. In February, 1868, plaintiffs applied to defendants for seed, and the defendants exhibited a catalogue of the seed they had for sale, among which was large Bristol cabbage seed. The plaintiffs then ordered some of that seed, with other, and the seed was delivered to them, the cabbage seed being billed "large Bristol cabbage seed." The seed thus sold had been raised upon Bristol cabbage stocks, which were in the vicinity of other varieties of cabbage, and were fertilized by the pollen therefrom, and consequently the seed in question became impure, and lost the character and quality of Bristol cabbage seed, and the plants raised by the plaintiffs therefrom were of no known variety, and of no value except for fodder. In an action for damages, *held*, that the defendants warranted the seed to be Bristol cabbage seed; that there was an implied warranty that the seed had been properly raised; and that the proper measure of damages was the difference in value between the crop raised and a crop of Bristol cabbage of that year.*

* See *Brady v. Morrill*, 40 Vt. 45; 24 Am. Rep. 103, and note, 104.

In an action for damages for breach of warranty of seed, interest on the damages from the time when the crop would have been harvested and sold, cannot be recovered.

In an action of damages for breach of warranty for sale of a chattel, declarations of the vendor's agent, eight months after the sale, and not connected with any present business transaction, that the chattel was defective, are inadmissible in evidence.

ACTION for damages for breach of warranty on sale of seed. The facts are stated in the opinion. The plaintiffs had judgment, and defendants appealed.

Lyman Tremain, for appellants. There was no express warranty. *Wilmot v. Hurd*, 11 Wend. 584; 2 Caines, 48; *Snell v. Moses*, 1 Johns. 96; *Holden v. Dakin*, 4 id. 421; *Welch v. Carter*, 1 Wend. 185; 8 Cow. 25; 5 N. Y. 73; Kent's Com. Sales, 1 Den. 378; 20 Johns. 196; *Duffee v. Mason*, 26 Barb. 141; *Moses v. Meade*, 5 Den. 617. There was no implied warranty. *Bartlett v. Hoppock*, 34 N. Y. 118; *Howard v. Emerson*, 110 Mass. 320; 14 Am. Rep. 608; *Hoe v. Sanborn*, 21 N. Y. 552; Dart's V. and P. 261; *Loomis v. Newhall*, 15 Pick. 169; *Zule v. Zule*, 24 Wend. 76; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Gates v. Caldwell*, 7 Mass. 68; *Sumner v. Williams*, 8 id. 201; *Parkhurst v. Van Cortland*, 1 Johns. Ch. 273; *Norton v. Woodruff*, 2 N. Y. 153; *Dounce v. Dow*, 64 id. 411; 34 id. 118. Anticipated profits could not be allowed as damages. *Passinger v. Thorburn*, 34 N. Y. 634, 639; *Ferris v. Comstock*, 33 Conn. 513.

Esek Cowen, for respondents. There was an implied warranty that the seed were genuine and merchantable. *Cleu v. McPherson*, 1 Bosw. 480; *Howard v. Hoey*, 23 Wend. 350; *Reed v. Randall*, 29 N. Y. 358; *Messmore v. N. Y. Shot and Lead Co.*, 40 id. 422; 1 Story on Cont., § 514; 1 Pars. on Cont. 464; 2 Kent's Com. 479; *Hawkins v. Pemberton*, 51 N. Y. 198; *Dounce v. Dow*, 64 id. 411. There was an implied warranty that the seed was fit for the purpose for which it was bought. *Hoe v. Sanborn*, 21 N. Y. 552. The rule of damages was correct. Sedg. on Dam. 328, 329; *Griffin v. Colver*, 16 N. Y. 489; *Passinger v. Thorburn*, 34 id. 634; *Milburne v. Belloni*, 39 id. 53; *Messmore v. N. Y. Shot and Lead Co.*, 40 id. 422; *Flick v. Weatherbee*, 20 Wis. 392; *Parks v. Morris Ax and Tool Co.*, 9 Alb. L. J. 409; *Wolcott v. Mount*, 36 N. J. (7 Vroom) 272. Interest from the time the crop

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would have been harvested and sold was properly allowed. *Van Rensselaer v. Jewett*, 2 N.Y. 135; *Dana v. Fiedler*, 12 id. 40; *Fishell v. Winans*, 38 Barb. 230.

ANDREWS, J. [Omitting a question of incorporation.] We come now to the consideration of the questions involving more directly the merits of the action. The question whether there was a warranty by the defendants, that the seed sold to the plaintiff was "genuine large Bristol cabbage seed," which is the warranty found by the referee, must be deemed to be established by his finding, unless it is without support in the evidence. The contract for the purchase and sale of the seed was made under these circumstances: The defendants were growers of garden seeds for sale, and the plaintiffs were market gardeners raising vegetables for sale in the market. In 1867 they bought of the defendants cabbage seed, of the variety known as large Bristol cabbage seed, which produced Bristol cabbage. In the fall of 1867, Miller, one of the trustees of the defendants, informed the plaintiffs that they had raised that year 200 pounds of Bristol cabbage seed, like that the plaintiffs had had, and solicited them to come early if they wished any. In February, 1868, the plaintiffs went to the seed store of the defendants to purchase seeds, and on making their business known to the defendants' clerk, he produced a printed catalogue of the seeds the defendants had for sale, and exhibited it to the plaintiffs; and among the seeds in the list was large Bristol cabbage seed. The plaintiffs then ordered seeds of different kinds, and among others, six pounds of "Bristol cabbage seed." The clerk made a memorandum of the kind and amount of seeds ordered, and promised to deliver them to the plaintiffs within a few days. Some days afterward the clerk put up the seeds, including six pounds of cabbage seed, and delivered them at Aiken's store, in Albany, for the plaintiffs, with a bill of parcels, as upon a sale by Miller to the plaintiffs. The cabbage seed was described in the bill as "six pounds large Bristol cabbage" seed.

The doctrine that a bargain and sale of a chattel of a particular description imports a contract or warranty that the article sold is of that description, is sustained by a great weight of judicial authority. The cases of *Seixas v. Wood*, 2 Caines, 48, and *Swett v. Colgate*, 20 Johns. 196, based mainly upon the authority of the case of *Chandler v. Lopas*; Cro. J. 4, are, it must be admitted, adverse

to this view. The case of *Chandler v. Lopus* has been overruled in England, and the cases in this State referred to have been often questioned, and Chancellor KENT, who took part in deciding *Seixas v. Wood*, intimates in his Commentaries a doubt whether the case was correctly decided. 2 Kent, 479. The case of *Hawkins v. Pemberton*, 51 N. Y. 198 ; 10 Am. Rep. 595, adopts, as the law in this State, the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified ; and this case was recognized in *Dounce v. Dow*, 64 N. Y. 411, as modifying the doctrine of *Seixas v. Wood*, and *Sweet v. Colgate*. We think the modern doctrine upon the subject is reasonable, and proceeds upon a just interpretation of the contract of sale. A dealer who sells an article, describing it by the name of an article of commerce, the identity of which is not known to the purchaser, must understand that the latter relies upon the description as a representation by the seller that it is the thing described ; and this constitutes a warranty. We content ourselves without further argument with referring to some of the cases bearing upon this question, which must, we think, be regarded as decisive. *Barr v. Gibson*, 3 M. & W. 390 ; *Bridge v. Wain*, 1 Stark. 505 ; *Shepherd v. Kain*, 5 B. & Ald. 240 ; *Behn v. Burness*, 3 B. & S. 749 ; *Allan v. Lake*, 18 Ad. & El. (N. S.) 561 ; *Power v. Barham*, 4 Ad. & El. 473 ; *Borrekins v. Bevan*, 3 Rawle, 37 ; *Henshaw v. Robbins*, 9 Metc. 83 ; *Hawkins v. Pemberton*, *supra*.

The referee was, therefore, justified in finding that the defendants warranted the seed sold to the plaintiffs to be large Bristol cabbage seed, from the fact that the plaintiffs applied to purchase that description of seed ; and that the seed delivered was designated in the bill of parcels as large Bristol cabbage seed. The fact that Chauncey Miller was named in the bill of parcels as vendor did not preclude the plaintiffs from treating the transaction as a sale by the defendants, and the representation as having been made by them. Miller was, in fact, acting as their agent. The negotiation for the purchase of the seed was made at the store of the society some days before it was delivered. It was sent in compliance with the plaintiffs' order made at that time. The bill of parcels was made for the purpose of showing that the seed sent corresponded with the order and the amount of the purchase, and not to show that the contract was the contract of the agent, or that he

was the vendor, and not the society. The plaintiffs could, perhaps, have elected to treat the warranty as the individual warranty of Miller, but they were not confined to that remedy. If, in fact, the sale was by the defendants, the plaintiff had the right to treat the contract and representation as theirs. The claim, that the trustees had no power to bind the society by the warranty in question, is not well founded. They had, as an incident to their power to make contracts of sale, the power to give the article sold a name and descriptive character; and, upon the warranty arising from a sale of seeds by designation, the society is clearly bound, irrespective of the question whether the trustees had general authority from the society to make an express warranty on sales. Aside from the warranty raised in this case by the description in the bill of parcels, there was, also, upon the sale in question, within the authority of *Hoe v. Sanborn*, 21 N. Y. 552, a warranty implied by law, that the seed sold were free from any latent defect arising from the mode of cultivation. It was decided in *Hoe v. Sanborn*, that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor; and there seems to be the same reason for implying a warranty on a sale of seeds by the grower, that they are not defective from improper cultivation, as to imply a warranty of freedom from defects in the manufacture, on a sale by a manufacturer of the article made by him. The grower of seeds must be presumed to be cognizant of any omission, or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use.

It is claimed by the defendants that there was no breach of any warranty shown, assuming that a warranty was proved, for the reason that the seed sold were large Bristol cabbage seed. That the seed were Bristol cabbage seed is, as the defendants insist, established by the fact that they grew upon stocks of Bristol cabbage. The referee finds that the seed was raised upon Bristol cabbage stocks, but he further finds that these stocks were planted in the vicinity of stocks of other varieties of cabbage, and were fertilized by the pollen therefrom, and that, in consequence of the crossing of the varieties, the seed grown upon the Bristol cabbage stocks became impure, and were not genuine Bristol cabbage seed, but lost that character and quality, and that the plants raised by

the plaintiffs from the seed purchased from the defendants, with a very few exceptions, in consequence of such crossing, were of no known variety of cabbage, and were of no value except as food for cattle. The evidence on the part of the plaintiffs shows that they set out 105,000 plants raised from this seed, of which 100,000 lived and grew vigorously, but about 200 only produced Bristol cabbages. That the defendants intended to sell, and the plaintiffs to buy seed which under proper cultivation, if it grew at all, would produce Bristol cabbages, is evident. The defendants knew that the plaintiffs were market gardeners, and desired this particular variety of seed. Bristol cabbages were regarded as a valuable variety for marketing. The defendants raised the seed, and it was not Bristol cabbage seed, within the meaning of the warranty, whatever its botanical or scientific designation might be, unless it would produce Bristol cabbages. Whether the seed was Bristol cabbage seed within the warranty depends not upon the origin of the seed, or the stocks upon which it grew, but upon the fact whether Bristol cabbages as known in the market could be raised therefrom. The contention of the defendants that the warranty was not broken, if technically, or in the language of botanists, the seed was Bristol cabbage seed, cannot therefore be sustained. But, if the defendants are right upon this point, the question would still remain whether there was a breach of the implied warranty; that the seed was free from defects arising from improper and negligent cultivation.

The referee, in fixing the damages, followed the rule laid down in *Passinger v. Thorburn*, 34 N. Y. 634, which was also an action for a breach of warranty, in the sale of cabbage seed. The defendant in that case warranted the seed to be Bristol cabbage seed, and that it would produce Bristol cabbage. The court held, all the judges concurring, that the plaintiff was entitled to recover the difference in value between the crop raised from the defective seed, and a crop of Bristol cabbage, such as would ordinarily have been produced in the year in which the seed was to be sown. The learned judge, who delivered the opinion, referred to a large number of authorities as sustaining the rule adopted by the court; and, among others, to the case of *Randall v. Roper*, E. B. & E. 84, in which it was held that in an action on a warranty, made by the defendants to the plaintiff, on a sale by the former to the latter of seed barley, that the seed sold was "chevalier" seed barley, but

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which was, in fact, barley of an inferior quality; the plaintiffs, who had resold the barley, with a similar warranty, could recover of their vendors the loss sustained by the sub-vendees, measured by the difference in value between the inferior crop produced and that which might have been produced from "chevalier" barley. The case of *Passinger v. Thorburn* was approved in *Milburn v. Belloni*, 39 N. Y. 53, and was said by the court to be decisive of the case then under consideration. In *Wolcott v. Mount*, 36 N. J. 262; 13 Am. Rep. 438; 20 id. 425, and *Fleck v. Weatherton*, 20 Wis. 392, the rule adopted in *Passinger v. Thorburn* was approved and applied by the court. We think the case of *Passinger v. Thorburn* should be adhered to. It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principle. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. *Masterton v. The Mayor, etc.*, 7 Hill, 61; *Griffin v. Colver*, 16 N. Y. 489; *Messmore v. The N. Y. Shot and Lead Co.*, 40 id. 422. But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passinger v. Thorburn* are incapable of being ascertained with reasonable certainty by a jury?

The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted, under similar circumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these and other circumstances may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind.

The referee allowed interest on the damages from the time the crop would have been harvested and sold. We are of opinion that this was erroneous. The demand was unliquidated, and the amount could not be determined by computation simply, or reference to market values. *McMahon v. N. Y. & E. R. R. Co.*, 20 N. Y. 469; *Smith v. Veto*, 60 id. 106; Sedg. on Dam. 377.

The remaining questions arise upon exceptions taken by the defendants to the admission or rejection of evidence, and without passing upon the validity of the other exceptions of this character we are of opinion that the referee erred in allowing the conversation between Chauncey Miller and the plaintiff White, at the interview between them, in the fall of 1868, to be given in evidence. This conversation occurred nearly eight months after the sale of the seed, and the making of the warranty upon which the action is brought. If the declarations of Miller on this occasion were admissible to bind the society, they furnished very material evidence to sustain the plaintiffs' case. The plaintiffs sought to establish among other things, that the defect in the seed was owing to improper and negligent cultivation, thereby raising an implied warranty, in addition to the warranty arising out of the description in the bill of parcels; and it was also an essential part of their case, to establish that the seed sold were not Bristol cabbage seed; and this they sought to show, by proving by gardeners and other persons who had purchased seed of the defendants of the same kind as that sold to the plaintiffs, that their crops had also failed, and that the seed did not produce Bristol cabbage. The admissions of Miller, in the conversation proved, tended to establish both of the facts referred to, viz.: that the seed was inferior and mixed, owing to the improper cultivation, and that it would not produce Bristol cabbage. He stated in the conversation, that the impurity of the seed was owing to planting the Bristol cabbage stocks in the vicinity of stocks of the red cabbage, and that the society had, in consequence of the defective character of the seed, lost their own crops of cabbage in that year. The proof of this conversation was objected to on several grounds; and among others, that the declarations of Miller, when not engaged in the business of the society, were not admissible. The general rule is, that what one person says out of court is not admissible to charge or bind another. The exception is in cases of agency; and in cases of agency, the declarations of the agent are not competent to charge the principal, upon proof merely that the relation of principal and agent existed when the declarations were made. It must further appear that the agent, at the time the declarations were made, was engaged in executing the authority conferred upon him, and that the declarations related to, and were connected with the business then depending, so that they constituted a part of *res gestæ*. In

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Fairlie v. Hastings, 10 Ves. 127, Sir WILLIAM GRANT expressed with great clearness and accuracy, the doctrine upon this subject. He said: "What an agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to the agreement. Therefore, if a writing is not necessary by law, the evidence must be admitted, to prove the agent did make that statement or representation. So, with regard to acts done, the words with which these acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or the other of these ways, I do not know how what is said by an agent can be evidence against the principal. The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent." See, also, Story on Ag., §§ 134, 137; *Thalhimer v. Brinckerhoff*, 4 Wend. 394; *Hubbard v. Elmer*, 7 id. 446; *Luby v. H. R. R. Co.*, 17 N. Y. 131. The rule that the declarations of the agent are inadmissible to bind the principal unless they constitute the agreement which he is authorized to make, or relate to and accompany an act done in the course of the agency, is applicable in all cases, whether the agent is a general or special one, or the principal is a corporation or private person. Angell & Ames on Corp., § 309; 1 Greenl. Ev., § 114a.

The conversation with Miller was inadmissible within the rule stated. It was not a part of any contract between the society and the plaintiffs, nor was it connected with any business which Miller was at the time transacting for the defendants. The plaintiffs had not then, so far as it appears, made any claim that the defendants were liable on the warranty, or that the failure of the crop was owing to a defect in the seed. The plaintiff White states that up to the time of the conversation he had not been able to account for the failure. He had written to Miller before the conversation, and requested him to look at the crop, and to explain, if he could, the cause of the failure; and not receiving an answer, he went to see Miller, when the conversation referred to occurred. Miller at this time made no contract or arrangement with White for a settlement or adjustment of any liability incurred by the society, and he had no authority to bind the society if he attempted to do so, to pay the large damages subsequently claimed by the plaintiffs. The covenant expressly declares that no important contract made by the

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trustees shall be considered valid without the previous approbation of the ministry and elders. An agreement to pay several thousand dollars damages on a sale of thirty-six dollars' worth of seed, would be an important contract, beyond the power of the trustees alone to make.

For these reasons, we are of opinion that the referee erred in the admission of the conversation in question.

The evidence was important, and we cannot say that it did not influence the result. For the error in admitting it, the judgment should be reversed and a new trial granted.

All concur.

RAPALLO and MILLER, JJ., concur in opinion as to question of evidence, and in result on other grounds.

Judgment reversed.

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(71 N. Y. 154.)

Antenuptial contract — when avoided by misrepresentation.

A procured the execution by B, his intended wife, of an agreement by which, in consideration of \$500 to be paid to her if she survived him, she agreed to relinquish all her rights in his property and estate. He represented to her, without reading, and without her reading, the agreement, that she was to receive \$500 in cash, \$500 if she survived him, and the deed of a house and lot. Nothing whatever was ever given her under the agreement. In proceedings after his death, *held*, that the agreement was void, and the widow was entitled to her distributive share in his estate.

Ante-nuptial agreements are severely scrutinized by the courts, and owing to the confidential relations of the parties, *it seems* that the presumption is against their validity, and that the burden of proof is upon the husband to prove the perfect fairness of the transaction. (*See note, p. 26.*)

APPEAL from a judgment modifying a surrogate's decree on final accounting of the respondent, widow of the intestate, as administratrix. The surrogate credited her with \$500, and denied her any distributive share in the estate. The Supreme Court struck out that credit, and gave her her distributive share. The other facts appear in the opinion.

W. Gleason, for appellant.

J. H. Maynard, for respondent.

MILLER, J. Upon the accounting of Mrs. Pierce, as administratrix of her deceased husband's estate, before the surrogate, it was held that the ante-nuptial agreement entered into at the time of their marriage was valid and in full force, and for that reason she was not entitled to a share, as his widow, in the distribution of his estate, and was only allowed the amount named in said agreement. The agreement referred to purported to have been entered into in contemplation of marriage, and for the purpose of making provision for a fit and proper settlement by the deceased, for the benefit of his intended wife, and thereby the deceased agreed that if the marriage was had and solemnized, he would, in case she survived him, pay or cause to be paid to her, the sum of \$500 for her sole and separate use; and she agreed, in consideration of the "money paid to her," that said money should be in full satisfaction of her dower, and bar her from claiming the same, or any share of his personal property, unless given to her.

We are of the opinion that the contract in question cannot be upheld, for the reason that the evidence establishes beyond any controversy that it was executed by the respondent, under a belief — which was created by the conduct and declarations of the deceased — that it contained more beneficial provisions in her favor than were contained in the same, and that the deceased, taking advantage of the confidential relationship existing between him and the respondent, who was the intended wife of the deceased, he was chargeable with fraud and misrepresentation in procuring her signature to the same.

Ante-nuptial contracts, whereby the future wife releases her claim to her right of dower, and all other rights to the estate of her husband upon his decease, are fully recognized in law. When fairly made and executed without fraud or imposition, they will be enforced by the courts. The surrender and release of rights to be acquired by the intended wife by the marriage relation must, however, be regarded with the most rigid scrutiny; and courts will not enforce contracts of this nature against the wife where the circumstances establish that she has been overreached and deceived, or been induced by false representations to enter into a contract

which does not express or carry out the real intention of the parties. The relationship of parties who are about to enter into the married state is one of mutual confidence, and far different from that of those who are dealing with each other at arms' length. This is especially the case on the part of the woman; and it is the duty of each to be frank and unreserved when about to enter into an ante-nuptial contract, by a full disclosure of all facts and circumstances which may in any way affect the agreement. *Kline v. Kline*, 57 Penn. St. 120.

In the case cited, which involved the validity of a marriage contract, it was held there was error in the charge of the judge to the jury that the woman was bound to exercise her judgment, and take advantage of the opportunity that existed to obtain information — if she did not do so, it was her fault; and that the parties were dealing at arms' length. See, also, case of *Kline's Estate*, 64 Penn. St. 122, which holds that parties to such a contract occupy a confidential relation; and *Tarbell v. Tarbell*, 10 Allen, 278; *Fay v. Rickman*, 1 N. C. (Bush's Eq.) 278; *Woodward v. Woodward*, 5 Sneed, 49. These authorities go very far in holding that the courts require strict proof of fairness, when called upon to enforce an ante-nuptial contract against the wife, and especially when it is apparent that the provision made for the wife is inequitable, unjust and unreasonably disproportionate to the means of the husband. The rule undoubtedly is that in such a case every presumption is against the validity of the contract, and the burden of proof is cast upon the husband, or those who represent him, in order to uphold and enforce the same as a valid and subsisting agreement. It is also a well-settled principle that a court of equity will interpose its power to set aside an instrument executed between parties who stand in confidential relations, when there is evidence showing fraud, or even when it appears that undue influence has been exercised, when one party is so situated as to exercise a controlling influence over the will, conduct, and interest of the other. *Sears v. Shafer*, 6 N. Y. 268; *Nesbit v. Lockman*, 34 id. 167. So, also, when one party is intrusted to reduce a contract to writing, he is bound to do so faithfully and truly; and any variation from it, by omitting some of its terms, or by inserting provisions not embraced in it, if not known to the other party and distinctly assented to by him, is a clear fraud. *Botsford v. Mc Léan*, 45 Barb. 478-488, and authorities cited. While parties to a written agreement

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should look out for themselves, and ordinarily the written contract is presumed to express their common intention, yet, when one occupies a confidential relationship to the other, and was intrusted with reducing it to writing, and it is clearly made to appear that the written contract was untrue, and misrepresents and misstates the real intention as understood and agreed upon, it cannot stand. More especially is this rule applicable when undue advantage has been taken and a fraud perpetrated. Within the rules referred to, a case is made out by the evidence which establishes that the alleged ante-nuptial agreement was nugatory and void. The testimony is uncontradicted and unimpeached, that when the respondent signed the contract she acted under a belief and conviction that she was thereby to receive the sum of \$500 in cash, a deed of a house and lot, and \$500 if she survived the deceased. The contract was stated or read to the respondent as containing those provisions, before the proposed marriage; and when it was assented to by her, at the time when the contract was finally executed, the deceased stated to the clergyman who performed the marriage ceremony and witnessed the written agreement, that it was unnecessary for him to read it—intimating that the contents were known and understood. It was not read at that time, nor does it appear distinctly that it was ever read by the respondent at any time. It is also proved that after the marriage, on one occasion, the deceased asked the respondent if she did not wish she had the contract, and she replied it was not good for any thing, unless he paid her the \$500 he had agreed to. And in the summer of 1860 the respondent stated to the deceased that he had agreed to give her the house and lot, and asked him why he did not do it; and he replied, that perhaps she should have the house he lived in, or to that effect. It thus appeared that he acquiesced in the statement made as to the contents of the contract, and did not deny that it contained the provisions claimed by her. The proof referred to shows that he kept it all the time in his own possession, or under his own control; and when called upon to fulfill his engagement, he failed to deny the statements as to the agreement actually made, and virtually admitted that they were correct.

It is plain that the respondent understood the contract as containing the provisions stated by the deceased, and that the deceased understood that such was her belief as to its contents. He permitted her to act on this hypothesis, and while laboring under an

entire mistake, without correcting it, and it does not rest with his heirs now to claim that it was otherwise than the deceased stated and the respondent understood at the time. She married him under such a belief, and he having knowledge that such was her understanding of the agreement, those who represent him are estopped now from insisting that the contract was valid and should be enforced.

For the reasons stated, the alleged contract was invalid and void, and the General Term very properly modified the decree of the surrogate by allowing the respondent a distributive share, as widow, in the estate of the deceased.

No other question raised demands comment, and the judgment of the General Term should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

Judgment affirmed.

NOTE BY THE REPORTER.—The duty of courts to exercise a vigilant scrutiny of marriage settlements whenever fraud is alleged has been asserted in many cases. The following are the principal cases cited by the court and counsel on this point in the principal case.

Page v. Horne, 11 Beav. 227, A. D. 1848. Here a settlement in contemplation of marriage was made of the woman's own property on herself, and was revoked by her without consultation on the day before the marriage. The revocation was held invalid in the absence of proof of its entire fairness. The court said: "It is true that no influence is proved to have been used; but no one can say what may be the extent of the influence of a man over a woman, whose consent to marriage he has obtained. Here, the husband having mortgaged the property, we are told by the report of the master that no undue influence had been used. The court, however, will look with great vigilance at the circumstances and situation of the parties in such cases as the present, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used." "I think it was not competent for him afterward to deal with her alone, in obtaining a revocation of the settlement."

Taylor v. Rickman, 1 N. C. 278, A. D. 1853. This was a bill filed by a purchaser of property from defendant's wife, and alleged to have been settled by him on her before marriage. The court said: "To entitle the plaintiff to the aid of the court in carrying into effect the marriage articles executed by the defendant and the sister of the plaintiff, it was necessary for him to allege and prove that the instrument was executed by the defendant deliberately, and without surprise or imposition. The plaintiff makes the allegation, but it is denied by the defendant, who avers that the execution of the instrument was obtained from him both by surprise and imposition, for that the subject was never mentioned to him until the parties were on the floor to be married; that he was surprised, confused, and in the act of going off without being married, whereupon being told by the magistrate that the paper would not be valid without being registered, and believing afterward that he would have his election either to have it registered or not he leaves it to be inferred that he did sign it, and the parties were then married. He kept the paper and never did have it registered." "The plaintiff has failed to prove his allegation." The property in question was two negro slaves owned by the wife before marriage.

Cobbett v. Brock, 20 Beav. 594, A. D. 1855. The principal doctrine was recognised. Here a debtor induced a lady, whom he was engaged to marry, to become security for his debt. It was held that although the wife might complain of the transaction as between

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herself and her husband, yet the only duty of the creditor, who was aware of the relation of the parties, was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice, did not affect his security.

Quinn v. Allison, 2 DeGex, F. & J. 521, A. D. 1860. Where a widower married the sister of his deceased wife, and she after such marriage gave him all her property, it was held that the burden of showing that at the time of entering into the transaction she was fully, fairly, and truly informed of its character, and of her legal status, was on the husband, and also that such a marriage was not a sufficient consideration for such a conveyance. The case seems to have been put on the latter ground, for the court said, supposing both parties to have been aware of the true state of the law, "nothing can well be conceived more immoral than for a woman to make over the whole of her property to a man in contemplation of continuing an illicit intercourse with him for the remainder of their joint lives."

James v. Holmes, 31 L. J. (N. S.) Ch. 567, A. D. 1862. When a man lived with a woman in the character of her husband, and obtained money from her that he might invest it, the court refused, without positive proof, to declare that he was not a trustee, or to permit him after eleven years to claim the money or investments as his own, or as a loan. The plaintiff was illiterate, and the money was obtained while the defendant was promising to marry her.

Kline v. Kline, 37 Penn. St. 120, A. D. 1868. The court below charged that "the woman was bound to exercise her judgment, and take advantage of the opportunity that existed to obtain information; if she did not do so, it was her own fault. The parties were dealing at arm's length. He was not bound to disclose to her the amount or value of his property." This was held error. The court say: "There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her. To consider such persons as in the same category as buyers and sellers, and to say that they are dealing at arm's length, we think is a mistake. Surely when a man and woman are on the eve of marriage, and it is proposed between them, as in this instance, to enter into an ante-nuptial contract upon the subject of the enjoyment and disposition of their respective estates, it is the duty of each to be frank and unreserved in the disclosure of all circumstances naturally bearing upon the agreement. *It may perhaps be presumed in the first instance that such disclosure was made*, but any designed and material concealment ought to avoid the contract at the will of the party who has been injured." The words italicized are *obiter*, and evidently in conflict with the well-settled doctrine, but the opinion was addressed only to the error of the charge, and expresses the right doctrine so far as it was necessary to go.

Wollaston v. Tribe, 9 L. R. Eq. 44, A. D. 1869. One claiming under a marriage settlement, not subject to revocation, has the burden of proving that the gift was understood by the donor to be irrevocable. The question was between the donor and nephews and nieces. The court said, "She never had fully explained to her the nature of the settlement which she executed, and she was really in the hands of persons who derive a benefit from the settlement."

Fulk v. Turner, 101 Mass. 494, A. D. 1869. A voluntary settlement, by a woman in contemplation of marriage, of her property in trust for her exclusive benefit during her life notwithstanding the marriage, will not be set aside after the marriage, on the mere ground that the trustee was her confidential adviser, although she is able to manage the property, and wishes to regain possession. The court said, "She appears to have been in a state of independence, and wholly disregarded what she avers he advised in respect to her marriage: and where such independence exists, a contract will not be set aside merely on account of confidential relations."

Rockafellow v. Newcomb, 37 Ill. 183, A. D. 1870. Here the principal doctrine was invoked for the protection of the man against the woman. The intended husband, at the woman's solicitation, had deeded her a piece of land worth \$7,000 in exchange for one worth \$700; and afterward she declined to marry him. The court amended the conveyance. The court

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said: "This man with his fervid passion and strong love was not well matched against an accomplished woman, in the incipient stages of their engagement." "The contest was unequal. A woman can always exercise an undue influence over the man she professes to love." "The woman felt and knew her power and exercised it. She replied, 'There is no use of further talk of our marriage.' This accomplished the object. Appellant yielded, and executed the deed. She had an undue influence over him, and took advantage of the relation between them. That this influence existed, and was exercised to the great benefit of one, and to the great disadvantage of the other, there can be no doubt. There could be no other relations between persons where a greater influence could be exerted, and an undue purpose more easily achieved. This situation of the parties with respect to each other; the close intimacy; the loving correspondence; the threat to annul the marriage contract; the great difference in the value of the two pieces of property, all raise the presumption of undue influence."

Russell's Appeal, 75 Penn. St. 293, A. D. 1874. It was here held that while the mere omission of counsel to advise the insertion of a power of revocation in an ante-nuptial agreement made by a woman is not ground to set aside a voluntary conveyance, yet the absence of such a power, and failure of counsel to advise the insertion, are circumstances to show a want of deliberate execution, and cast upon the person claiming the benefit under the agreement the burden of proving its fairness. Here the husband was dead, and the claimants were others provided for by the agreement.

The best review of the adjudications on this subject is White and Tudor's *Leading Cases in Equity*, 4th American edition, page 1156, case of *Huguettin v. Bassly*, and notes.

MYNARD V. SYRACUSE, ETC., R. R. CO.

(71 N. Y. 180.)

Common carrier—contract relieving from his own negligence.

In a contract limiting the liability of a common carrier, an exemption of liability for his own negligence will not be inferred unless unequivocally expressed. So where by a contract of shipment of animals, a carrier, in consideration of a reduced rate of freight, was released from "liability of every kind whatsoever," by reason of damage "from whatsoever cause arising;" *held*, that this did not include a loss arising from the carrier's own negligence.*

A carrier of animals is under the same liability as other common carriers, except where the damage for which compensation is sought is a consequence of the conduct or propensities of the animals.†

* See *Christensen v. American Express Co.* (15 Minn. 270), 2 Am. Rep. 122, and note, 129; *Adams Express Co. v. Stettinners* (61 Ill. 184), 14 Am. Rep. 57; *Westcott v. Fargo* (61 N. Y. 542), 19 Am. Rep. 300; *Michigan Southern, etc., R. R. Co. v. Heaton* (37 Ind. 448), 10 Am. Rep. 89, and note, 96; *Lamb v. Camden & Amboy R. R. & Transp. Co.* (46 N. Y. 271), 7 Am. Rep. 327.

† See *Michigan Southern & Northern Ind. R. R. Co. v. McDonough* (31 Mich. 165), 4 Am. Rep. 486; *Lake Shore & Michigan South. R. R. Co. v. Perkins* (25 Mich. 329), 12 Am. Rep. 275; *Kansas Pacific Ry. Co. v. Nichols* (9 Kans. 235), 12 Am. Rep. 494, and note, 506; *Louisville, etc., R. R. Co. v. Hedger* (9 Bush, 645), 15 Am. Rep. 740.

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ACTION for damage for the loss of a steer in transportation on defendant's road. The facts appear in the opinion. The defendant had judgment, and the plaintiff appealed.

Wm. H. Warren, for appellants.

Ruger & Jenney, for respondents. Plaintiffs are presumed to have assented to the contract. *Pindar v. Res. Fire Ins. Co.*, 47 N. Y. 114; *Breeze v. U. S. Tel. Co.*, 48 id. 132; *Kirkland v. Dinsmore*, 62 id. 171; *Fibel v. Livingston*, 64 Barb. 179. A common carrier can exempt himself from liability for any loss or damage to freight he transports, even though caused by his negligence. *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. C. R. Co.*, id. 196; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442; *Poucher v. N. Y. C. R. R. Co.*, 49 id. 263; *Wells v. St. Nav. Co.*, 4 Seld. 375; *Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61; *Lee v. Marsh*, 43 Barb. 102; *Keeney v. G. T. R. R. Co.*, 59 id. 104; *French v. B., etc., R. R. Co.*, 4 Keyes, 108; *Nicholas v. N. Y. C. R. R. Co.*, 4 Hun, 327; *Magnin v. Dinsmore*, 56 N. Y. 168; *Boswell v. H. R. R. Co.*, 5 Bosw. 699; *Peek v. N. S. R. Co.*, 10 H. L. Cas. 494; *Shaw v. York, etc., R. Co.*, 13 Q. B. 347; *Austin v. Man., etc., R. Co.*, 16 id. 600; 10 C. B. 454; *Chippendale v. Lan., etc., R. Co.*, 7 Eng. L. & Eq. 395; *Carr v. Lan., etc., R. Co.*, 7 Exch. 707; *Wyld v. Pickford*, 8 M. & W. 443; *Walker v. York, etc., R. Co.*, 2 El. & B. 750; *Hughes v. G. W. R. Co.*, 14 C. B. 637; *Morville v. G. N. R. Co.*, 10 Eng. L. & Eq. 366; *Pardington v. So. Wales Co.*, 1 H. & N. 392; *McCawley v. Furness R. Co.*, L. R., 8 Q. B. 57; *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 445.

CHURCH, C. J. The parties stipulated that the animal was lost by reason of the negligence of some of the employees of the defendant without the fault of the plaintiff. The defense rested solely upon exemption from liability contained in the contract of shipment by which, for the consideration of a reduced rate, the plaintiff agreed to "release and discharge the said company from all claims, demands and liabilities of every kind whatsoever for or on account of, or connected with, any damage or injury to or the loss of said stock, or any portion thereof, from whatsoever cause arising."

The question depends upon the construction to be given to this contract, whether the exemption "from whatever cause arising,"

should be taken to include a loss accruing by the negligence of the defendant or its servants. The language is general and broad. Taken literally it would include the loss in question, and it would also include a loss accruing from an intentional or willful act on the part of servants. It is conceded that the latter is not included. We must look at the language in connection with the circumstances and determine what was intended, and whether the exemption claimed was within the contemplation of the parties.

The defendant was a common carrier, and as such was absolutely liable for the safe carriage and delivery of property intrusted to its care, except for loss or injury occasioned by the acts of God or public enemies. The obligations are imposed by law, and not by contract. A common carrier is subject to two distinct classes of liabilities—one where he is liable as an insurer without fault on his part; the other, as an ordinary bailee for hire, when he is liable for default in not exercising proper care and diligence; or, in other words, for negligence. General words from whatever cause arising may well be satisfied by limiting them to such extraordinary liabilities as carriers are under without fault or negligence on their part.

When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms. In *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. (U.S.) 344, a contract that the carriers are not responsible in any event for loss or damage, was held not intended to exonerate them from liability for want of ordinary care. NELSON, J., said: "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands." This rule has been repeatedly followed in this State. In *Alexander v. Greene*, 7 Hill, 533, the stipulation was to tow plaintiff's canal boat from New York to Albany at the risk of the master and owners, and the Court

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of Errors reversed a judgment of the Supreme Court with but a single dissenting vote, and decided that the language did not include a loss occasioned by the negligence of the defendants or their servants. In one of several opinions delivered by members of the court, it was said, in respect to the claim for immunity for negligence: "To maintain a proposition, so extravagant as this would appear to be, the stipulation of the parties ought to be most clear and explicit, showing that they comprehend in their arrangement the case that actually occurred."

Wells v. Steam Nav. Co., 8 N. Y. 375, expressly approved of the decision of *Alexander v. Greene*, and reiterated the same principle. GARDNER, J., in speaking of that case, said: "We held, then, if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility on account of the gross neglect of himself or his servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to usage and the general understanding of men of business, would not be implied from a general expression to which effect might otherwise be given."

So, in the *Steinweg Case*, 43 N. Y. 123; 3 Am. Rep. 673, the contract released the carrier "from damage or loss to any article from or by fire or explosion of any kind," and this court held that the release did not include a loss by fire occasioned by the negligence of the defendant; and, in the *Magnin Case*, still more recently decided by this court (56 N. Y. 168), the contract with the express company contained the stipulation "and, if the value of the property above described is not stated by the shipper, the holder thereof will not demand of the Adams Express Company a sum exceeding fifty dollars for the loss or detention of, or damage to, the property aforesaid."

It was held, reversing the judgment below, that the stipulation did not cover a loss accruing through negligence, JOHNSON, J., in the opinion, saying: "But the contract will not be deemed to except losses occasioned by the carrier's negligence, unless that he expressly stipulated." In each of these cases, the language of the contract was sufficiently broad to include losses occasioned by ordinary or gross negligence, but the doctrine is repeated that, if the carrier asks for immunity for his wrongful acts, it must be expressed, and that general words will not be deemed to have been intended to relieve him from the consequences of such acts.

These authorities are directly in point, and they accord with a wise public policy, by which courts should be guided in the construction of contracts designed to relieve common carriers from obligations to exercise care and diligence in the prosecution of their business, which the law imposes upon ordinary bailees for hire engaged in private business. In the recent case of *Lockwood v. Railroad Co.*, 17 Wall. 357, the Supreme Court of the United States decided that a common carrier cannot lawfully stipulate for exemption from responsibility for the negligence of himself or his servants. If we felt at liberty to review the question, the reasoning of Justice BRADLEY in that case would be entitled to serious consideration; but the right thus to stipulate has been so repeatedly affirmed by this court, that the question cannot with propriety be regarded as an open one in this State. 8 N. Y. 375; 11 id. 485; 24 id. 181-196; 25 id. 442; 42 id. 212; 49 id. 263; 51 id. 61.

The remedy is with the legislature, if remedy is needed. But, upon the question involved here, it is correctly stated in that case that "a review of the cases decided by the courts of New York shows that, though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms." Such has been the uniform course of decisions in this and most of the other States, and public policy demands that it should not be changed. It cannot be said that parties, in making such contracts, stand on equal terms. The shipper, in most cases, from motives of convenience, necessity or apprehended injury, feels obliged to accept the terms proposed by the carrier, and practically the contract is made by one party only, and should, therefore, be construed most strongly against him; and especially should he not be relieved from the consequences of his own wrongful acts under general words or by implication.

There was a period when the courts of England were inclined to relax this rule, and this led to the adoption of an act of Parliament on this subject, under which the courts have since acted. See 10 House of Lords Cases, 473.

It is argued that the rule does not apply to the carriage of animals; that, in respect to such property, the common-law liabilities of common carriers do not attach; that the carrier is only liable for negligence, and hence that the stipulation can apply to nothing else.

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There might be some force in this point, if the position that carriers of animals are only liable for negligence or misconduct is correct. But that position cannot be maintained. The liability of carriers of animals is modified only so far as the cause of damage for which recompense is sought, is a consequence of the conduct or propensities of the animals undertaken to be carried. In other respects, the common-law responsibilities of the carrier will attach. This was expressly held in *Clarke v. R. & S. R. R. Co.*, 14 N. Y. 573, DENIO, J., said: "But the rule which would exempt the carrier altogether from accidents arising out of the peculiar character of the freight, irrespective of the question of negligence, would be equally unreasonable. It would relieve the carrier altogether from those necessary precautions which any person becoming the bailee, for hire of animals, is bound to exercise; and the owner, where he did not himself assume the duty of seeing to them, would be wholly at the mercy of the carrier. The nature of the case does not call for any such relaxation of the rule; and, considering the law of carriers to be established upon consideration of sound policy, we would not depart from it, except where the reason upon which it is based wholly fails, and then no further than the cause for the exemption requires." The case of *Palmer v. Railway Co.*, 4 Mees. & Wels. 749, is cited, where the same principle is decided. Animals may die of fright, by refusing to eat, or break from their fastenings, and kill themselves, although every proper precaution was used; but there may be many accidents producing loss or injury to animals which are not attributable to acts of God, and which were not caused by the peculiar character of the property. By the act of God is meant something which operates without any aid or interference from man. *Merritt v. Earle*, 29 N. Y. 115. In that case it was held that the carrier was liable for the value of a span of horses lost by the sinking of a steamboat, caused by coming in contact with the mast of a sloop which had been sunk in a squall two days before. The court decided that sinking the steamboat was not caused by the act of God, and that the sinking of the sloop, although by the act of God, was too remote, and many accidents might happen producing loss to animals for which the carrier would be liable, although no fault or negligence could be imputed; and in respect to such, the common-law liability would attach. Angell on Carriers, p. 180, lays down the same rule. The same qualification of liability applies to all property.

The carrier is excused from liability for loss caused by inherent infirmity or tendency to decay. It has been held that a carrier is not responsible for the evaporation of liquids, nor for the diminution of molasses, caused by the oozing through vent holes necessary to prevent the bursting of barrels (Angell on Carriers, § 211, and cases cited); and exemptions from liability for loss by inherent qualities of animals, rests upon the same principle. Beyond this the common-law liabilities exist against the carrier of animals the same as the carrier of other property, and the clause in the contract can, therefore, operate in many cases where negligence cannot be imputed.

In Massachusetts in *Smith v. R. R. Co.*, 12 Allen, 531, the court says: "The common-law liability of a carrier for the delivery of live animals is the same as that for the delivery of merchandise. Upon undertaking their transportation, he assumes the obligation to deliver them safely against all contingencies, except such as would excuse the non-delivery of other property." The qualification above referred to, excusing the carrier from liability of loss occasioned by the nature and character of the property, is recognized. This qualification or exception, as before stated, is applicable to all property, and does not affect the common-law liabilities to any greater extent than in respect to other property, except that the instances may be more numerous where the carrier will be excused. In Angell on Carriers, § 214, it is said: "Such a case would seem to be analogous to the case of loss of merchandise owing to some inherent defect which caused the destruction of it while in transit." As well might carriers be exempted from common-law liabilities for loss of inanimate property as for animals, if immunity from loss from inherent defects, or from the nature and character of the property, will produce that result.

The only authority seeming to favor the position of the respondent is in *Cragin v. N. Y. C. R. R. Co.*, 51 N. Y. 61; 10 Am. Rep. 559. The loss of the hogs in that case was caused by heat, and the negligence attributed was in not cooling them off with water. We do not think, under the peculiar stipulation, and the character of the property in that case, that it is in conflict within the views before expressed.

The judgment of the General Term must be reversed, and that of the county court affirmed.

All concur, except ANDREWS, J., taking no part; FOLGER, and MILLER, JJ., absent.

Judgment accordingly.

ONTHANK V. LAKE SHORE, ETC., R. R. CO.

(71 N. Y. 194)

Easement—change of manner and place of exercise of.

Under a grant of a right to enter upon the grantor's lands and lay water-pipe, without specifying the place or the size of the pipe, after the grantee has once laid the pipe he cannot increase the size of it or lay it in any other place.

TRESPASS. The opinion states the facts. The plaintiff was nonsuited; this was set aside at General Term, and defendant appealed.

A. P. Laning, for appellant, cited *Cromwell v. Selden*, 3 N. Y. 253; *Borst v. Empie*, 5 id. 33; *Jackson v. Fish*, 10 Johns. 456; *Beddoe v. Wadsworth*, 21 Wend. 120..

H. C. Kingsbury, for respondent.

EARL, J. In May, 1863, one Brown, whose farm adjoined that of the plaintiff, executed to the Buffalo and State Line Railroad Company a deed granting to it, and its successors and assigns forever, the right to enter upon his land "for the purpose of building and maintaining a reservoir for water, and laying down and maining an iron pipe or conductor to carry the water from said reservoir to the water-tanks at the Portland station, and also the right to build and maintain blind and covered ditches to conduct the water to the said reservoir; the said iron pipe is to be laid at least two feet below the surface of the ground." The plaintiff knowing of the contents of this deed, on the same day executed to the same company a deed granting to it, and its successors and assigns forever, the right to enter upon his land "for the purpose of laying down and keeping in repair an iron pipe or conductor, to carry water to the water-tank near the Portland depot, which pipe are to be laid at least two feet below the surface of the ground." The defendant has succeeded to the rights of the grantee in these deeds. At the date of the deeds, there was a spring on Brown's land, the water of which flowed out of his land on to and across plaintiff's

land, in a well-defined, natural channel, which furnished a constant supply of water for plaintiff's cattle and horses.

After the deeds were given, the grantee excavated a reservoir upon Brown's land, and collected therein the water of the spring and of the adjacent land; and it laid down two-inch iron pipe from the reservoir across Brown's land and plaintiff's land to Portland station. The pipe thus laid down remained until 1871, and during all that time there was enough surplus water flowing in the old channel to supply all plaintiff's wants. In 1871, the defendant improved and repaired the reservoir and the drains leading into it, and put down a four-inch pipe, instead of the two-inch pipe, and thus used so much of the water of the spring as to leave running an insufficient quantity for the use of the plaintiff. This action was brought for the injury caused plaintiff by laying down the enlarged pipe, and thereby diverting the increased quantity of water.

Plaintiff's grant to the railroad is general and indefinite. It does not define or limit the place in which the pipe was to be laid, nor specify what water was to be conducted. Hence the surrounding circumstances, such as the existence of the spring, the channel over plaintiff's land, the execution of the deed by Brown, the topography of the country, and the acts of the parties both prior and subsequent to the grant may be considered for the purpose of learning the intention of the parties, and thus defining and limiting the easement granted. *French v. Hays*, 43 N. H. 30. It is thus made manifest that it was intended by plaintiff's grant to give the right to lay down pipe to conduct water from the reservoir on Brown's land over his land to the Portland station, which would otherwise flow in the natural channel above mentioned.

After the grantee had once laid its pipe, and thus selected the place where it would exercise its easement thus granted in general terms, what was before indefinite and general became fixed and certain, and the easement could not be exercised in any other place. This is confessedly so in reference to rights of ways granted in similar terms. Washburn on Easements, 225, 240; *Wynkoop v. Burger*, 12 Johns. 222. And the same rule of construction was applied to the right to lay an aqueduct from a spring, granted in general terms, in *Jennison v. Walker*, 11 Gray, 423. In that case BIGELOW, J., said: "Where an easement in land is granted in general terms, without giving definite location and description to it, so that the part of the land over which the right is to be ex-

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exercised cannot be definitely ascertained, the grantee does not thereby acquire a right to use the servient estate without limitation as to the place or mode in which the easement is to be enjoyed. When the right granted has been once exercised in a fixed and definite course, with the full acquiescence and consent of both parties, it cannot be changed at the pleasure of the grantee." And he said: "This rule rests on the principle that when the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties, contemporaneous with the grant giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties."

It is clear, then, that the right to lay the pipe under plaintiff's grant was fixed by the act of the grantee, and the acquiescence of the grantor to the place taken, and it cannot be exercised in any other place across plaintiff's land. But why is not the right also fixed for the same reasons as to the size of the pipe, and the quantity of water to be diverted? I can perceive no reason for confining the operation of this rule to the mere place where the right is to be exercised. There is the same reason for applying it to the entire right granted. In *Bannon v. Angier*, 2 Allen, 128, the same learned judge again said: "Where a right of way or other easement is granted by deed without fixed and defined limits, the practical location and use of such way or easement by the grantee under his deed acquiesced in by the grantor, at the time of the grant, and for a long time subsequent thereto, operate as an assignment of the right, and are deemed to be that which was intended to be conveyed by the deed, and are the same in legal effect as if it had been fully described by the terms of the grant."

The language used in plaintiff's grant shows quite clearly that it was not intended that after the grantee had laid down a pipe, it should have the right to enter upon the land to lay down a larger pipe. The right granted was to enter upon the land, and lay down a pipe two feet below the surface, and to keep *that* pipe in repair, not to enter upon the land at any time, and dig up the soil for the purpose of laying down a larger pipe.

Plaintiff's action is therefore maintainable and the order of the General Term must be affirmed, and judgment absolute for plaintiff.

All concur, except CHURCH, C. J., not voting; FOLGER and MILLER, JJ., absent.

Order affirmed and judgment accordingly.

Judgment affirmed.

NASH V. MITCHELL.

(71 N. Y. 199.)

Agency of husband as to wife's separate property.

Defendant, a married woman, executed and deposited with a bank in which she kept an account, a power of attorney authorizing her husband to "make, sign, indorse, and accept all checks, notes, drafts and bills of exchange for her and in her name." She carried on no trade or business, but owned real estate, which she rented. The husband, in exchange for the plaintiff's check payable to his own order, gave them a post-dated check signed by himself in defendant's name, which was dishonored. In an action thereon, *held*, (1) it was for the plaintiff to prove that the transaction was within the agent's powers and for the benefit of the defendant's estate or in her business; (2) the receipt and disposal by a married woman of the rents of her real estate is not the carrying on of a trade or business within the statute authorizing married women to carry on trade or business; (3) the power of attorney did not authorize the husband to create a debt or charge it upon his wife's estate, and the giving such check was not within his authority.

ACTION on a check, dated November 9, 1872, to the order of the plaintiff, signed "J. H. Mitchell, by C. H. Mitchell, attorney," indorsed by plaintiffs, and duly dishonored. The check was given on the 4th of November, 1872, in exchange for one of the same amount, drawn by the plaintiffs, to the order of C. H. Mitchell, and paid on the latter day. The defendant was the wife of C. H. Mitchell; she had given and deposited in the Bank on which her check was drawn, and in which she kept her account, a power of attorney authorizing her husband "to make, sign, indorse and accept all checks, notes, drafts and bills of exchange for her in her name," etc. She had a house and ten acres of land, on which she resided, and which she carried on by her husband's agency, he hiring the hands and paying them, by checks drawn by him in her name. She had other real estate for which she received rents, and for which she paid disbursements in like manner. At the time the check in suit was made, she had not a deposit large enough to pay it. The plaintiffs had judgment, and defendant appealed.

James E. Wheeler, for appellant.

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Sam. J. Crooks, for respondents. Defendant was bound by the acts of her husband. *N. Y., N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30-73; *N. R. Bk. v. Aymar*, 3 Hill, 262; *F. & M. Bk. v. Butchers' Bk.*, 16 N. Y. 125; *Bodine v. Killeen*, 53 id. 93; *Foster & Persch*, 4 N. Y. Wkly. Dig. 134. Defendant had power to perform the acts delegated to her husband. *Frecking v. Rolland*, 53 N. Y. 422; *Bodine v. Killeen*, id. 93; *Quas. Nat. Bk. v. Waddell*, 1 Hun, 125; *Baum v. Mullen*, 47 N. Y. 577; *Sherman v. Elder*, 24 id. 381; *Ainsley v. Mead*, 3 Lans. 116; *Merchant v. Bunnell*, 3 Keyes, 539. The law will presume that the money was borrowed for the benefit of defendant's separate estate, and for use in her private business. *McVey v. Cantrell*, 5 N. Y. Wkly. Dig. 105; *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 593; *Dyett v. N. Am. Coal Co.*, 20 Wend. 570; *Barnett v. Lichtenstein*, 39 Barb. 194; *Yale v. Dederer*, 22 N. Y. 450; *Owen v. Cawley*, 36 id. 600; *Ballin v. Dillaye*, 37 id. 35; *White v. McNett*, 33 id. 371.

ALLEN, J. The *onus* was upon the plaintiffs to show: First, that the drawing of the check by the agent was within the power delegated to him by the defendant; and, second, that it was in a transaction and for a consideration in respect of which the disabilities of the defendant as a *feme covert* were removed, and she at liberty to contract and assume liabilities as if she were *feme sole*. There was no evidence that the husband of the defendant had assumed to act or had acted with the knowledge of the defendant without or beyond the scope of the written power of attorney, so that no question can arise as to the extent of his powers. The real and apparent power being the same, it must be determined by the instrument by which it was conferred. The attorney was authorized "to make, sign, indorse, and accept all checks, notes, drafts, and bills of exchange for" the defendant, and in her name, and the power of attorney was deposited with the bank in which she kept an account, as its authority to accept the signatures and indorsements of the agent in the name of the principal in all matters mentioned in the instrument.

All the acts authorized *ex vi termini* necessarily had respect to the separate estate and property of the defendant, as to which she had the statutory ability to contract. She could not delegate power beyond this, or authorize another to do that for her, which she could not do in person. The power granted was to deal with the

moneys and choses in action, parts of the separate estate of the defendant, and not to create a debt, or charge the separate estate for a debt, although contracted for the benefit of the estate. The bank was not authorized to pay a check if the defendant was without funds to meet it; and had it done so, the separate estate of the defendant would not have been charged with its payment. The plaintiffs were bound to know: First, the legal capacity of the defendant to contract; and, second, the actual authority of the agent with whom they dealt. *North River Bank v. Aymar*, 3 Hill, 262. The agent did not by the check transfer, or assume to transfer, or act in respect to funds and moneys on hand, and subject to draft as a part of the separate estate of the defendant. The effect of the transaction, if legitimate and obligatory, was to contract a debt payable in the future, and charge the same upon the separate estate of the defendant, which was not within the terms of the authority. But had the defendant in person drawn and delivered the check to the plaintiffs upon the same consideration, it could not have been charged upon her separate estate without proof that the debt was contracted for the benefit of her estate. In *McVey v. Cantrell*, 70 N. Y. 295, recently decided, the declaration of the defendant at the time of borrowing the money, that she wanted it to pay interest due upon a mortgage upon her land was held sufficient evidence that the debt was contracted for the benefit of her estate.

A married woman may be estopped by her acts and declarations in all matters in respect of which she is capable of acting *sui juris*. *Bodine v. Killeen*, 53 N. Y. 93.

The common-law disabilities of married women are so far removed by statute in this State, that they may make contracts and create debts in or about any trade or business carried on by them or relating to or for the benefit of their separate estate. Upon contracts thus made, and for debts thus created, their separate estate is chargeable by law. They may also create an express charge upon their estate upon and for other contracts and debts, or as security for others; but it must be created in terms and by writing. *Manhattan B. & M. Co. v. Thompson*, 58 N. Y. 80; *Corn Ex. Ins. Co. v. Babcock*, 42 id. 614; 1 Am. Rep. 601. There is no charge upon the estate of the defendant created by the terms of the check. It is in the ordinary form of a draft upon a bank, and only imports the ordinary obligations of that class of commercial instru-

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ments. The defendant was not carrying on a trade or business. The management of her landed property, the receipt of the rents and income and disposing of them, was not a trade or business within the meaning of the statute enabling married women to carry on a trade or business. That statute has respect to business pursuits, mechanical, manufacturing, or commercial. The care and supervision of lands and property owned by a *feme covert* is not the carrying on of a separate trade or business. If it were so, every married woman who owns a house and garden, or has a deposit in a savings bank, would be a tradeswoman carrying on a business.

There is no evidence that the check related to, or was given for the benefit of the defendant or her separate estate, or in her business, or that the plaintiffs supposed it was so given. Upon the face of the transaction, it was given for money loaned to the husband. The plaintiffs gave their check, payable at sight to the order of the husband, and received for it the check in suit, payable several days in the future. If we were at liberty to assume, without proof, the principal and main fact necessary to maintain the action, we could affirm the judgment. But the affirmative upon this, as upon every material issue, and as to every fact necessary to be established, was with the plaintiff. The referee has not found this fact, and could not have found it upon the evidence. The plaintiffs, suing a married woman, were bound to prove every fact; not only the contract, and that it was made by her or by her authorized agent, but that it was a contract she was capable of making. The law does not authorize the presumption, and courts cannot assume, without evidence, that a simple contract, without any thing on its face to indicate the fact, was made for the benefit of the estate of a married woman. The disabilities of a married woman are general, and exist at common law. The capabilities are created by statute, and are few in number; and exceptional. It is for him who asserts the validity of a contract of a *feme covert* by evidence, to bring it within the exceptions.

The judgment must be reversed, and a new trial granted.

All concur, except RAPALLO, J., not voting, and FOLGER and MILLER, JJ., absent.

Judgment reversed.

BURROWS V. WHITAKER.

(71 N. Y. 291.)

Sale of chattels — title — delivery.

Title to personal property passes by delivery, although there remains something to be done to ascertain the value at the agreed rates, unless by the terms of the contract of sale this was to be done before delivery.

Defendant agreed to buy of plaintiff all the lumber which he should deliver at a specified place on D. river, before a certain time; and prices were agreed on for the good and for the culled. Defendant was to cull and pile, and the lumber was to be counted on the bank or estimated in the raft at that place. The delivery was commenced, and a portion was culled and piled, but before it could be counted or estimated it was carried away by a freshet. In an action to recover the contract price of the amount so delivered, *held*, (1) that the evidence sustained a finding of delivery and acceptance; (2) that delivery of the whole amount contracted for was not necessary to pass title to that delivered.

ACTION for lumber sold and delivered. The opinion states the facts. The plaintiff had judgment, and defendant appealed.

O. W. Chapman, for appellant. Delivery of all the lumber was necessary to pass title to any part. *Kein v. Tupper*, 52 N. Y. 550, 555; *Corrigan v. Sheffield*, 10 Hun, 227; *Andrews v. Durant*, 11 N. Y. 40. The title could not pass until after delivery and acceptance. *Comfort v. Kiersted*, 26 Barb. 472; *Halterline v. Rice*, 62 id. 593; *Chitty on Contracts*, 378; *Andrews v. Durant*, 11 N. Y. 35, 40. Title would not pass until there had been a complete culling of the lumber. *McDonald v. Hewett*, 15 Johns. 349; *Rapelye v. Mackie*, 6 Cow. 250; *Stevens v. Eno*, 10 Barb. 95; *Evans v. Harris*, 19 id. 416; *Joyce v. Adams*, 8 N. Y. 291; *Olyphant v. Baker*, 5 Den. 379, 381; *Andrew v. Dieterich*, 14 Wend. 32, 35; *Ward v. Shaw*, 7 id. 404; *Halterline v. Rice*, 62 Barb. 593, 598; *Groat v. Gile*, 51 N. Y. 431; *Crofoot v. Bennett*, 2 id. 258; *Bradley v. Wheeler*, 44 id. 495; *Stevens v. Santer*, 49 id. 35.

A. C. Moss, for respondent.

MILLER, J. The most important question to be determined in this case relates to the single point whether there was a delivery

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of the lumber in dispute to the defendant. By the contract, which was entered into in the spring of 1872, the defendant was to pay the price agreed upon for all the good and culled lumber which the plaintiff should deliver at Travis' Eddy, on the bank of the Delaware river, prior to the first rafting freshet in the spring of 1873. The delivery was commenced in the early part of December, continued until the middle of January, or a little later, when a freshet occurred, which swept away the lumber, to recover the value of which this action is brought, and which constituted a portion of the entire lumber drawn and placed on the bank. At this time, all the lumber had not been drawn, and the defendant had not commenced rafting, or seen or handled the same, nor had it been counted or estimated, although a man, furnished by the defendant, had assisted in unloading and in culling and piling the lumber.

The question whether there was a valid delivery and acceptance of the lumber washed away by the freshet, and title to the same conferred upon the defendant, must be determined by the testimony relating to the contract. The plaintiff swears that he was to deliver what lumber he could, at prices which were fixed, on the bank at Travis' Eddy, on the Delaware river, and that the defendant agreed to buy the same, and to furnish a man to pile and cull the lumber. He said he did not want the culls in, as it would hinder him about rafting, and he would cull and pile it, so as to have it ready to raft; and it was agreed that it should be counted on the bank or estimated in the raft. The defendant's version of the contract is, that he was to take such lumber as plaintiff could get on the bank at rafting time, at which period it was to be counted on the bank; or, if estimated, to be done when rafted, and he denies that he agreed to have a man to cull and pile the lumber. The evidence is somewhat contradictory, and what were the exact terms of the contract presented a question of fact for the determination of the jury. If the plaintiff's testimony was true, then the contract was for a delivery on the bank, to be piled and culled by defendant's man. It was not stated that this person should have direct authority to receive the lumber formally, on behalf of the defendant; but, as he had something to do with it in carrying the contract into effect, it is, perhaps, not an unreasonable presumption that he was authorized to receive the lumber. He could not well perform the work which he was assigned to do, without some

act of ownership or control, on behalf of the defendant, over the lumber after it was left at the place of deposit which had been provided for under the contract. It further appears, as a circumstance showing the defendant's understanding of the contract, and that he considered himself the owner of the lumber upon its delivery; that, at a subsequent time, without consulting the plaintiff, and without plaintiff's knowledge, and before the lumber had been counted or the quantity estimated, he made up three rafts of the lumber, which was not washed away, and took them down the river, thus assuming that he was the owner and that the title was in him. There were also declarations of the defendant tending to show that such was his construction of the contract. In view of all the evidence and the circumstances connected with the transaction, it was, I think, a fair question for the jury to decide what the actual contract was, and whether the delivery of the lumber was perfect and complete.

The claim of the defendant that there was no sale, but an executory contract to manufacture and deliver the lumber, and that title to a part of the lumber did not pass until the whole was drawn, is not, I think, well founded. The lumber was to be drawn at different times, in quantities, and the nature of the contract is at war with the idea that it was an entirety. It contained no provision from which such an interpretation can be inferred, and the circumstances all tend to a different conclusion. The authorities relied upon to uphold the position contended for are not in point. In *Kein v. Tupper*, 52 N. Y. 550, the contract was for the sale and delivery of a certain number of bales of cotton, to be paid for on delivery, and it was held that no action could lie until the whole was delivered. The delivery of the entire number of bales was a condition precedent of payment, and hence until their delivery the right of action was not perfect.

In *Andrews v. Durant*, 11 N. Y. 35, there was a contract for the building of a vessel, which was to be paid for during the progress of the work, and no property vested in the person for whom it was to be built until it was fully completed. These decisions have no application to a case where the property is to be delivered at different times, and received and accepted, as a delivery was made from time to time, as was the case here. Even if it may be doubted whether the contract contemplated that title to the lumber should not pass, until the whole of the lumber was delivered, it was at

least a question as to the intention of the parties to be determined from the evidence. *Terry v. Wheeler*, 25 N. Y. 520; *Bacon v. Gilman*, 57 id. 656; *Shindler v. Houston*, 1 Comst. 261, 265, 269. And this question was one for the jury to decide.

Upon the question argued by the defendant's counsel, whether a complete and final culling of all the lumber was required, I think no serious difficulty arises. The general rule is well settled, that upon a sale of chattels, title does not pass so long as any thing remains to be done before delivery, to ascertain the identity, quality, quantity, or price of the property, if, by a fair interpretation of the contract, any of these acts are to be done before or at the time of such delivery. See *Terry v. Wheeler*, *supra*; *Evans v. Harris*, 19 Barb. 416.

In the case at bar there is strong ground for claiming that the fair interpretation of the contract is, that title should pass upon the delivery of the lumber upon the bank, and it being thus delivered at a place designated by the defendant, it passed into his possession, and, as some of the testimony shows, was there piled and culled by an agent in the defendant's employment. The delivery was thus complete, and the culling of the entire quantity, or even the counting or measurement of the same, was not an essential element to the validity of the contract. This condition was not a condition precedent, upon which the execution of the contract depended. This case comes within the rule which holds, that although something remains to be done, yet if it clearly appears to be the intention of the parties, that the property shall be deemed to be delivered and the title pass, it shall be so held. *Olyphant v. Baker*, 5 Denio, 379; *Dexter v. Bevins*, 42 Barb. 573; *Keeler v. Vandervere*, 5 Lans. 313.

In *Crofoot v. Bennett*, 2 Comst. 258, the owner of a brickyard sold to the defendant a quantity of brick in a kiln, delivered to him possession of the yard, and executed to the plaintiff a bill of sale of all the bricks in the kiln; and it was held that the defendant was entitled to take the quantity named, although they were not counted out, marked or separated from the residue. It is said, in the opinion, "if the goods sold are clearly identified, then, although it may be necessary to number, weigh or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass."

It was also laid down that the distinction in all these cases does

not depend so much upon what is done as upon the object to be effected. If it be specification, the property is not changed; if merely to ascertain the total value at designated rates, the change of title is effected. It is very plain that the object of the culling and counting, or measuring, was merely as a means of ascertaining the total value, at the rates agreed upon; and hence the title became changed, without the entire lumber being culled, counted or measured.

This doctrine is familiar and sustained by numerous authorities. *Russell v. Carrington*, 42 N. Y. 118; *Macomber v. Parker*, 13 Pick. 175; *Riddle v. Varnum*, 20 id. 282; *Tyler v. Strang*, 21 Barb. 198; *Dexter v. Bevins*, *supra*.

But, independent of the rule referred to, the fair construction of the contract is, according to the ordinary rules of interpretation, that the defendant agreed to take such lumber as was brought by the plaintiff and delivered on the bank; and when he did this, and the defendant thus became possessed of the property, he was the absolute owner, and the culling, counting or measuring was not essential to establish a delivery. The proof also shows that the whole was piled, and this was an act of ratification, which sanctioned and approved the delivery.

In regard to the question of acceptance by the defendant no general act was required, and a delivery according to the terms of the contract vested the title in the purchaser. *Hyde v. Lathrop*, 3 Keyes, 597; *Dexter v. Bevins*, *supra*.

The charge of the judge, leaving it for the jury to decide whether it was the understanding between the parties, that a delivery on the bank was a complete performance for the purpose of the contract, and vesting the title in the defendant, was not liable to objection within the rules referred to. As we have seen, what was to be done after the delivery on the bank was not material, if the parties intended that the delivery there constituted a performance. The contract was then fulfilled; the lumber under the control and in possession of the defendant for the purpose of being rafted, and he became the absolute owner of the same.

The various rulings in regard to the evidence disclose no error, and the judgment must be affirmed with costs.

All concur.

Judgment affirmed.

MERRITT V. VILLAGE OF PORTCHESTER

(71 N. Y. 809.)

Statutory construction — assessments — duty of commissioners in making.

Statutes delegating power to charge the property of individuals with the cost of local improvements must be strictly pursued, and any substantial departure from the prescribed formula vitiates the proceedings.

Commissioners, appointed by legislative authority to apportion and assess the cost of a local improvement, were required by the statute to make oath, before entering on their duties, "faithfully and fully to discharge the duties." The oath taken was that each would perform the duties "to the best of his ability." In action to restrain the collection of the assessment, *held*, that their proceedings were illegal for defect in the oath.

Commissioners, appointed by statute to assess the cost of a local improvement, were by the statute required after making the assessment to publish notice of the time and place when and where the parties could be heard. The notice published was that "all persons feeling themselves aggrieved must present their objections in writing." *Held*, that the commissioners exceeded their jurisdiction in thus restricting the parties, and that the objection was not waived by appearing and filing written objections to two reports, which were sent back for correction, a new assessment being subsequently made with the same requirement for written objections.

ACTION to restrain sale of land for unpaid assessment for regulating and grading an avenue in the village of Portchester laid by commissioners appointed by the trustees under the village charter. The opinion states the facts. Defendants had judgment.

Calvin Frost, for appellants.

Odle Close, for respondents. The oath taken by the commissioners was a substantial compliance with the statute. *In re M. & H. R. R. Co.*, 19 Wend. 135; *Weeks v. Ellis*, 2 Barb. 320; *Foot v. Stiles*, 57 N. Y. 399; *Rusher v. Shermam*, 28 Barb. 416; *Stanton v. Ellis*, 2 Kern. 575; *B. & S. L. R. R. Co. v. Erie*, 48 N. Y. 93; *Sorchan v. City of B'klyn*, 3 Hun, 562, 565. The published notice was sufficient within the intent of the charter. *Sheldon v. Wright*, 7 Barb. 39; 5 N. Y. 497; *Olcott v. Robinson*, 21 id. 150; *Chamberlain v. Dempsey*, 13 Abb. 421; 22 How. 356; *Wood v. Morehouse*, 45 N. Y. 368.

ALLEN, J. The proceedings which it is sought to arrest were had by authority of a statute delegating power to charge the property of individuals situated within the corporate limits of the village of Portchester with the cost of certain local improvements. By the proceedings, pursued to their permitted termination, the owner may be deprived of his property, without his assent, and the immediate effect is to incumber them to the extent of the charge and assessment. It is a statutory proceeding, affecting the property of the citizen, and by which it may be taken from him; and, therefore, within well-established rules of law, the statute must be strictly pursued, and any departure, in substance, from the formula prescribed by law, vitiates the proceedings. The party whose property is to be reached may insist upon the observance of every form prescribed by statute which will in the least tend to his protection. In other words, the form must be strictly followed. *Gilbert v. Columbia T. Co.*, 3 Johns. Cas. 107; *Rex v. Croke*, Cowp. 26; *Adams v. S. & W. R. R. Co.*, 10 N. Y. 328; *Doughty v. Hope*, 3 Den. 594; *Seymour v. Judd*, 2 Comst. 464; *Sharp v. Spier*, 4 Hill, 76; *Bloom v. Burdick*, 1 id. 131; *Thatcher v. Powell*, 6 Wheat. 119. The commissioners of estimate and assessment, whose duty it was to apportion the cost of the improvement and assess it upon the property situated within the prescribed limits of benefit, were not authorized to act until they had taken the oath prescribed by law. Their appointment could only be consummated, and they fully inducted into office, by that ceremony. It was a condition precedent to their right to perform the functions of their office, and the oath was one of the safeguards provided by statute for the protection of the property holder, and the legislature, by prescribing the form, made the form of the essence of the act. That which the legislature has directed courts cannot declare immaterial. The statute required the commissioners to make oath before entering upon their duties, "faithfully and fairly to discharge the duties," etc. The oath taken was that each would perform the duties "to the best of his ability." The legislature laid stress and gave importance to the words "faithfully and fairly," incorporated in the oath as prescribed, and the courts have no right to say that they are unmeaning and without force, or that they might not affect the conscience as the oath actually taken, or any oath less solemn in form would not. As there are no words substituted for them, there is no room to hold that their place is supplied by equivalent words, or words

of equal force. The liberal interpretation which may sometimes be resorted to to uphold proceedings cannot be applied here, for the very obvious reason that there are no words in the oath taken to be interpreted as the equivalents of those prescribed. Two cases in the neighboring State of Pennsylvania are directly in point, although in neither was the departure from the statutory form of oath as great or as important as in the case at bar. In *Thompson v. White*, 4 S. & R. 135, the word "firmly" was omitted in the oath as to the belief of an appellant that injustice had been done by the award of arbitrators, from which it was desired to appeal. In *Cambria Street*, 75 Penn. St. 357, "road viewers," who answer to the commissioners appointed in this case and appointed for the same purpose, were required to take an oath that they would "impartially discharge their duties;" and they had substituted "faithfully" for "impartially" in the oath as administered, and it was held fatal to their power to act. The commissioners should have taken the oath as required by the statute, and not having done so, their proceedings were illegal. *People v. Connor*, 46 Barb. 333; *State v. Mayor of Jersey City*, 38 N. J. (L. R.) 85; *Same v. City of Perth Amboy*, id. 425.

The case *In the Matter of the Election of Directors of the M. & H. R. R. Co.*, 19 Wend. 135, is relied upon by the respondents to sustain the proceeding. It was there held by Judge COWEN, in an elaborate opinion, that the omission of the inspectors appointed to preside at an election of directors of an incorporated company, to be sworn in the form prescribed by statute, was no ground for setting aside the election upon a summary application. The learned judge came to his conclusions upon three distinct grounds: First, that the objection was waived by appearing at the election and voting without taking the objection, or by having notice of the election and being absent; second, that the inspectors were *de facto* officers, without having taken any oath, and that their acts were valid; and third, that the statute directing the inspectors to be sworn was directory, and not mandatory. There was no waiver here, for there was no opportunity to object; and there is nothing which the legislature directs to be done, or in any of the steps prescribed for the taking of individual property under a delegated power, which the courts can hold directory merely, and therefore to be observed or not, as may be convenient, the omission of which will not affect the proceedings.

The second ground, therefore, considered by the learned judge is the only one that could apply, and how much stress was laid upon that in reaching the final conclusion is not easy to learn from the opinion. But it may be assumed that the inspectors of an election of directors, deriving their authority from the appointment of the corporate body, acting without being sworn, are officers *de facto*, and their acts valid without affecting this case. Inspectors of election are ministerial officers, having certain duties to perform in the election of the governing officers of a corporation. Their acts do not affect the property of individuals, and they have no power over the property of the citizen. The difference between the powers exercised by the two classes of officers distinguish that case from the present, and leave the general principle that has ripened into an axiom in the law as to the necessity of strictly following the statute in all proceedings affecting property rights, applicable in all its force in this case.

Only one other of the several objections to the proceedings will be noticed. The statute under which the proceedings were had (Laws of 1868, chap. 818, title 5, § 25 [Charter of the Village of Portchester]), requires the commissioners, after making their estimate and assessment, to publish a notice of the time and place when and where the parties could be heard; and that after hearing the parties, to proceed and complete their report to the board of trustees of the village. There was no published notice of a time and place for the hearing of interested parties; but notice was given of the filing of the estimate and assessment, and of a time and place when and where the commissioners would meet; and that "all persons feeling themselves aggrieved, must present their objections in writing" to the commissioners. This was not the hearing required by the statute, and the commissioners exceeded their jurisdiction in restricting the parties in interest to written objections. The statute gave the right of an oral hearing, and the limitations imposed by the commissioners were unauthorized. *State v. Jersey City*, 1 Dutcher, 309; *Hopkins v. Mason*, 42 How. Pr. 115.

The appellants have not waived this objection. The commissioners made four successive reports to the board of trustees, the latter sending the same back three times for revision and correction, and the commissioners on each occasion made a new estimate and assessment, and gave a new notice to parties interested "to

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present their objections in writing." Each assessment was independent of every former assessment, and the same steps were required for its perfection. An appearance, and filing written objections to the first two reports, did not waive the defective notices in respect to the last two, or cure the defects.

The judgment must be reversed, and a new trial granted.

All concur.

Judgment reversed.

COBB V. KNAPP.

(71 N. Y. 348.)

Agency—undisclosed principal.

Defendant purchased of plaintiff wheat on his own credit, ordering it to be charged to him, and stating that it was for, and to be delivered at, the "Blissville Distillery." Plaintiff did not know the proprietors of the distillery. Subsequently the agent disclosed the names of the principals, and the plaintiff commenced an action against them. *Held*, that whether the principal was disclosed on the sale was a question of fact, and that the subsequent disclosure and action against the principals was not conclusive of an election to hold them alone responsible, but was evidence for the jury on that contested fact.*

ACTION for goods sold and delivered. The opinion states the facts. The plaintiff had judgment.

William A. Coursen, for appellant. The principal sufficiently disclosed. *Waddell v. Mordecai*, 3 Hill (S. C.), 22; 2 Kent's Com. 631; *Southwell v. Bowditch*, 1 C. P. Div. 100; *Page v. Stone*, 10 Metc. 160; *Hale v. Lauderdale*, 46 N. Y. 75; *Eaton v. Bell*, 5 B. & Ald.; *Owen v. Gooch*, 2 Esp. 567. Plaintiff could not maintain this action, having commenced an action, still pending, against defendant's principal. Story on Agency (7th ed.), 225; *Priestly v. Fernie*, 3 H. & C. 983; *Borell v. Trewell*, 3 Daly, 233; *Fitzsimmons v. Baxter*, id. 87.

Albert Matthews, for respondent.

CHURCH, C. J. This was an action for the purchase-price of a quantity of wheat alleged to have been sold by the plaintiff to the

defendant. The defense was that the defendant purchased the wheat as agent or broker for C. A. Steen & Co. It seems to have been conceded that the defendant did in fact purchase the wheat, as a broker, for the firm named, who were his principals, and the main contention on the trial was whether the defendant at the time of the purchase disclosed his principals, and whether he made the purchase in his own name and upon his own responsibility. The only exception in the case is upon a refusal to grant a nonsuit, and a request to direct a verdict for the defendant. The court charged the jury that a broker, although acting for another, makes himself personally liable if he contract in his own name, and without disclosing the name of his principal, and that this would be so, although the seller supposed at the time that he was acting as a broker or agent for another; that the subsequent disclosure of the principal, and the commencement of an action against him by the seller, would not discharge the broker from personal liability. There were no exceptions to the charge and I do not understand that the learned counsel for the appellant claims that it was erroneous in these respects; but he insists, from the facts appearing in the case, a nonsuit should have been granted or verdict ordered for the defendant. There was a sharp conflict of evidence between the parties as to what took place at the time of the contract. This court has no power to review the facts any further than to ascertain whether they are sufficient upon any construction, which the jury were authorized to give them to justify a verdict, whether any fact was conclusively proved which, as matter of law, entitled the defendant to a verdict. The credibility of witnesses, the construction of ambiguous evidence, and in general inferences to be drawn from circumstances, are exclusively for the jury. These views have been so often reiterated by this court, that it seems idle to refer to them, and quite unnecessary to cite authorities to sustain them. It is natural that parties, who feel aggrieved by verdicts, should struggle to have what they regard as injustice remedied, and hence it is the almost daily experience of this court to have questions of fact pressed upon our attention in some form as questions of law, while, except in a few cases, the review of facts is confined by statute to the Special and General Terms of the courts below. Our jurisdiction is fixed by the Constitution and the statute, and we have no authority to depart from their limitations. In this case the evidence of the defendant, which was to some extent corroborated, if true,

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established clearly a case of non-liability. He testified that he purchased the wheat for Steen & Co., and so informed the plaintiff, and that it was understood that Steen & Co. was to pay the purchase-price, and that the plaintiff did not make any claim against him at the time, nor for several years afterward. But for the purpose of determining whether it was a legal error to deny the motion for nonsuit we must take the evidence of the plaintiff. If that was sufficient to sustain the action, the jury had a right to adopt it. The plaintiff testified that not only was the principal not disclosed, but that the defendant expressly purchased the wheat on his own credit, and directed that it be charged to him; that it was charged to him, and a bill made against him, which he repeatedly promised to pay. If the jury adopted the plaintiff's evidence, it made a clear case of liability. Story on Agency, §§ 266, 267; 44 N. Y. 349. It is argued that because the defendant stated that the property was for the "Blissville Distillery," and was to be delivered there, that was a sufficient disclosure of the principal, but this is not conclusive. The plaintiff states that he did not know the proprietors of the distillery, and that the defendant directed the property to be charged to him.

The case of *Waddell v. Mordecai*, 3 Hill (S. C.), 22, is cited. That was an action against the defendant to recover \$100 paid on a contract executed by the defendant as agent of a brig, and signed "M. C. Mordecai for the owners." The agent had paid the money to his principals before the commencement of the action, and the court held that the plaintiffs could not recover. The learned judge who delivered the opinion reasoned that the disclosure was sufficient, but put the decision upon the ground mainly, that it appearing that the defendant had acted in good faith and delivered the money to his principals, the equitable action for money had and received could not be sustained. The general current of authority is against the sufficiency of such a signing to relieve the agent from liability, but it is unnecessary to express an opinion of its correctness, because in this case the agent, if the plaintiff's evidence is to be credited, contracted expressly on his own credit. The other case depended on is *Southwell v. Bowditch*, 1 Law Rep. (Com. Pleas Div.) 100, and s. c. on appeal, p. 374. The contract signed by the defendant was: "I have this day sold by your order, and for your account to my principals, five tons," etc. The Common Pleas Division held this to be a contract of purchase

by the broker, and that he was liable. The Court of Appeals reversed the decision, holding that it was a contract of sale by the broker, and not of purchase, and that it must be construed according to its tenor like other contracts. This decision does not aid the defendant.

The case of *Raymond v. The Proprietors of the Crown and Eagle Mills*, 2 Metc. 319, is in point for the plaintiff. The agent purchased goods saying they were for C. & E. Mills, and ordered them to be so marked. They were charged to the agent. The C. & E. Mills were a corporation. At the trial the judge charged that these facts were not conclusive evidence of the knowledge of the plaintiffs; that R. was the agent, and the Crown and Eagle Mills the principal, and the Supreme Court sustained the decision, holding that the language was ambiguous, and was properly left to the jury. Here the distillery named was not a corporation, and its name, therefore, conveyed no idea of its owners. It is not sufficient that the seller may have the means of ascertaining the name of the principal. If so, the neglect to inquire might be deemed sufficient. He must have actual knowledge. There is no hardship in the rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not, it must be presumed that they intend to be liable.

The subsequent disclosure of the principals by the agent, and the commencement of an action against them, is not conclusive of an election to hold them responsible only. 2 Metc., *supra*; *Curtis v. Williamson*, L. R., 10 Q. B. 57. In the recent case of *Beymer v. Bonsall*, 79 Penn. St. 298, it was held that neither the agent nor principal in such a case would be discharged short of satisfaction. The fact of commencing the action and the statements in the complaint were proper for the jury upon the contested fact, but they did not operate as a legal discharge. It was claimed by the plaintiff that the action was commenced upon the representation of the defendant, that a certain responsible person was a member of the firm of Steen & Co., which was untrue; but, however this was, it did not discharge the defendant.

The case was properly submitted to the jury, and if the result is wrong, it was the error of the jury. We are unable to find any exception in the case justifying a reversal of the judgment, and it must be affirmed

All concur.

Judgment affirmed.

ATTORNEY-GENERAL V. CONTINENTAL LIFE INS. CO.

(71 N. Y. 825.)

Check — equitable assignment of bank deposit.

A check in the ordinary form does not operate as an assignment of so much of the drawer's funds in the drawee's hands.*

An insurance company gave its check on a trust company in payment of a loss. The company's deposit at the time was larger than the amount of the check. Before the check was presented, a receiver of the company drew all the funds on deposit. The check not having been drawn on a particular fund, held, that the payee was not entitled to payment by the receiver in preference to other creditors of the company.

PETITION for an order directing the receiver of the Continental Life Insurance Company to pay the petitioner the amount of the check. Order granted. The opinion states the facts.

Ashbel Green, for appellant.

Elliott F. Shepard, for respondent. The draft was an equitable assignment of so much of the fund on deposit. *Vresland v. Blunt*, 6 Barb. 182; *Hosack v. Rogers*, 6 Paige, 415-429; *Hall v. Buffalo*, 1 Keyes, 193; *Burn v. Carvalho*, 4 M. & C. 690; *Morton v. Naylor*, 1 Hill, 583-585; *Yeates v. Groves*, 1 Ves. Jr. 280; *Dickinson v. Phillips*, 1 Barb. 454; *Lett v. Morris*, 4 Simons, 607; *Bradley v. Root*, 5 Paige, 632; *In re Alderson*, 1 Mod. 55; *Clark v. Mauran*, 3 Paige, 373; *McEwen v. Johnson*, 7 Cal. 258; *Wiggins v. McDonald*, 18 id. 126; *Le Roy v. Globe Ins. Co.*, 2 Edw. Ch. 657.

CHURCH, C. J. The check or draft was executed on the 14th of October, 1876, in settlement and payment of a policy on the life of the petitioner's husband. It was drawn on the United States Trust Company, and was in the form of an ordinary bank check. The company at the date of the check had upward of \$21,000 on deposit

*See *Aetna Nat. Bank v. Fourth Nat. Bank* (46 N. Y. 82), 7 Am. Rep. 314; *Carr v. Nat. Security Bank* (107 Mass. 46), 9 Am. Rep. 6, and note, 9; *Exchange Bank v. Rice* (101 Mass. 37), 9 Am. Rep. 1; *Case v. Henderson* (23 La. Ann. 49), 3 Am. Rep. 590. *Contra*: *Union Nat. Bank v. Oceana County Bank* (80 Ill. 312), 23 Am. Rep. 185, and note, 186.

in the trust company. The check was transmitted to the petitioner in California, indorsed by her and returned and presented for payment November 9, 1876, and payment refused. Previous to the presentation of the check, and on the 25th of October, a receiver of the insurance company was appointed, and on the 31st October, the receiver withdrew from the trust company all the funds which had been deposited. It is claimed that the check operated as an equitable assignment of the fund deposited, *pro tanto*, and the Special and General Term below so held, and granted an order directing the receiver to pay over the money to the petitioner, from which order the receiver appealed to this court.

I have examined the point with some care, and with a disposition to affirm the order, if it could be done consistently with the rules of law, but I am unable to do it. The authorities cited by the learned counsel for the petitioner fall far short of sustaining the proposition. The general rule is, that to constitute an assignment, the order must specify the particular fund upon which it is drawn. In this case the order or check was general, directing the trust company to pay to the order of the petitioner so much money. The authorities are uniform, and those cited by the counsel for the petitioner do not raise a conflict. In the case of *Vreeland v. Blunt*, 6 Barb. 182, the order was, "Please pay N. W. S., or order, \$7,000 out of the money you received from F. G., for me," etc., and it was accepted by the drawee when in funds, and this was properly held to be an equitable appropriation. In *Hosack v. Rogers*, 6 Paige, 415, the chancellor held that a covenant by one member of an insolvent firm that he would pay to such creditors as should release the two junior partners, the full amount of their debts out of the proceeds of his claims upon the French government, when received was in equity a specific appropriation of the fund for that purpose. The transaction was construed as within the principle of an order upon a particular fund, and there is nothing in the opinion indicating an intent to question the general rule. But the decree of the chancellor was reversed in the Court of Errors, 18 Wend. 319. COWEN, J., said: "Here is no assignment, no mortgage or pledge, or order, or any other specific appropriation of the French funds, but a mere covenant to pay them over on their being obtained by the covenantor."

Hall v. City of Buffalo, 1 Keyes, 193, was the case of orders by a contractor upon the comptroller upon a particular fund, viz.: the

fund provided by the city to pay him, and notice of same to the comptroller who represented the city, and it was held to be an equitable assignment. *Burn v. Carvalho*, 4 M. & C. 690, applied the doctrine of equitable assignment. It was there held that A., having goods in the hands of B., as his agent at a foreign port, and being indebted to C., by letter to C. promised that he would direct, and by a subsequent letter to B. did direct, B. to deliver the goods to an agent of C. at that port. Before the delivery and before the letter reached B., A. became bankrupt, and it was held that C. had a good title in equity to the goods. The decision was put upon the ground of an engagement to pay out of a particular fund. The Lord Chancellor says: "Here is an existing fund in an agent's hand, and there is a distinct contract to discharge the liability out of that fund, and to give directions for that purpose." It is unnecessary to approve of the construction placed by the court upon that transaction. It is sufficient to say that it does not sustain the doctrine of a lien by a general order. In the somewhat similar case of *Malcom v. Scott*, 3 Hare, 39, where the right of equitable lien was denied, the Vice-Chancellor, in referring to the decision in *Burn v. Carvalho*, said: "I do not conceive that Lord COTTENHAM meant to decide any thing more in that case than that when you make out the agreement to give the lien, the form of the transaction is not material." *Yeates v. Groves*, 1 Ves. Jr. 280, was the case of the giving up of a note by the holder upon receiving an order to pay out of certain purchase-money, of which the purchaser had notice, and was plainly within the general principle. *Bradley v. Root*, 5 Paige, 641, simply decided that the assignment of a mail contract, and an agreement that the assignee shall be entitled to the moneys to become due for carrying the mail, constituted an equitable lien on the fund, which was superior to a subsequent order on the same fund.

Murray v. Judah, 6 Cow. 484, was an action by the holder against the drawer of a check, and except for a remark of the circuit judge as a reason for denying a motion for a nonsuit in a preliminary stage of the trial, which can scarcely be regarded as a *dicta* in favor of the doctrine that a check upon a bank operates as an equitable assignment of the fund standing to the credit of the drawer, the case has no bearing upon the question. It was tried and decided upon appeal upon other grounds. These are the principal cases referred to by the learned counsel to support the posi-

tion of an equitable lien, and I have referred to them for the purpose of demonstrating how far short they are from giving countenance to that doctrine when applied to an ordinary check or inland bill of exchange. In all of them the general principle is applied, that the order, check, or draft must be on a particular fund, which must be specified, to have the effect of an equitable assignment.

The authorities against the claim of the appellant are numerous and decisive ; a few only need be referred to. *Harris v. Clark*, 3 Comst. 119, was the case of a bill of exchange, intended as a *donatio causa mortis*, drawn by the donor upon his depositary for \$30,000. RUGGLES, J., said : "These cases establish the rule that a draft, payable out of a particular fund, operates as an assignment of the fund *pro tanto* to the drawee that an accepted bill of exchange operates the same way, but none of them go to the extent of giving that effect to a bill not accepted." There is no legal distinction between an unaccepted check and a bill of exchange. The appellant claims in this case that the trust company is not a banking institution. If so, then according to the last decision, the instrument should be regarded as a bill of exchange, and less effective in creating a lien than an ordinary check upon a bank. But the distinction is without any difference in principle in respect to the question involved here.

Lunt v. Bank of North America, 49 Barb. 221, declares the rule accurately, that checks drawn in the ordinary form, not describing any particular fund, or using any words of transfer of the whole or any part of any amount standing to the credit of the drawer, but containing only the usual request, are of the same legal effect as an inland bill of exchange, and do not amount to an assignment of the funds of the drawer in the bank. This I believe to be the settled law of this State, as it has been repeatedly affirmed in this court. 60 N. Y. 153 ; 48 id. 682 ; 57 id. 270, 459 ; 46 id. 83 ; 7 Am. Rep. 314. This doctrine accords with the relations between the parties. Banks are debtors to their customers for the amount of deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate ; it vests no title or interest, legal or equitable, in the payee to the fund. Before acceptance, the drawer may withdraw his deposit ; the bank owes no duty to the holder of a check until it is presented for payment. Knowledge that checks have been drawn does not render

it obligatory upon the bank to retain the deposit to meet them. These rules are indispensable to the safe transaction of commercial business. Any other rule would produce confusion, and involve banking institutions and all depositaries of moneys in responsibilities to conflicting claimants, which, while producing great embarrassments, would serve no beneficial purpose. In this case, the instrument referred to no fund; did not purport to create a lien or assignment of any fund, and the trust company did not even have notice of it.

It only remains to consider whether there is any thing in the circumstances of the case to take it out of the general rule. It is urged that the statement in the petition, that the draft or check was intended to assign and transfer to the petitioner a like amount of the fund on deposit; but no fact is alleged showing such intention, and the allegation must be regarded as a conclusion of law. It is also urged that the receipt on the back, intended for the signature of the petitioner, took away its negotiability, and in some way transformed it into an assignment. A statement of the consideration for a draft or check, either generally or specifically, whether on the back or in the body of the instrument, does not affect its negotiability; and if it did, it would not create a lien or appropriation of the particular fund without some expression to that effect, or any acceptance by the drawee. Again, it is said that the trust company, in which the deposit was made, is not a bank, and that this fund was deposited and set apart to meet this demand, or at least demands of that character. It does not appear, unless by its name, that the company is not an ordinary banking institution, but the circumstance is quite immaterial. It is an institution, we must presume from the facts developed in this case, which received and paid out upon checks, deposits, and there is no fact stated indicating that the deposit was made for any special purpose. When the insurance company made the deposit, the trust company became its debtor to the amount of it, with the implied agreement to pay the same when requested. It does not appear that the fund was impressed with any trust, nor that it was not placed there for the general purposes of the depositor. It is doubtless true that, at the time this check was made, the officers of the insurance company expected that it would be paid, it may be, from the moneys then standing to its credit; but they might have increased the deposit, or changed or diminished

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it, or withdrawn it altogether. They gave the petitioner no specific lien upon it, either expressly or impliedly.

The petitioner was a creditor of the insurance company upon a claim upon a life policy. When she received the check, she was a creditor still, the claim not having been paid, but only liquidated. When the company failed and went into the hands of a receiver, the rights of all the creditors to all the assets became fixed by statute, and the petitioner, not having acquired any lien upon any of the assets, occupies the position of a general creditor. The necessary delay in transmitting the check for her indorsement, and, in returning it, was unfortunate, because, in the meantime, the statute had seized the assets, and provided for their distribution among all the creditors, and both precedent and reason have clearly defined and well established the general rule to be applied, and courts ought not to depart from it to meet a particular case of supposed hardship.

The order of the General and Special Term must be reversed, and the motion denied, but, under the circumstances, without costs.

All concur.

Ordered accordingly.

Judgment reversed.

 KEENEY V. HOME INSURANCE CO.

(71 N. Y. 396.)

Insurance—transfer of property insured—waiver of defect in proofs of loss—breach of warranty as to occupation.

A policy of fire insurance on partnership property contained a condition that a sale or transfer, or any change in title or possession, of the property, by legal process, judicial decree or voluntary transfer, should avoid the policy. In an action to dissolve the partnership one of the partners was appointed receiver. *Held*, not to avoid the policy.

A retention by an insurer of proofs of loss for thirty-eight days without objection will warrant a finding that all objections thereto were waived.*

In a fire policy the business carried on upon the uninsured premises was described as the manufacture of bath tubs. On adjoining premises the

*See *Jones v. Mechanics' Fire Ins. Co.* (36 N. J. 22), 5 Am. Rep. 318; *Pratt v. N. Y. Cent. Ins. Co.* (55 N. Y. 506), 14 Am. Rep. 304.

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insured also conducted the business of sawing and planing lumber, and the shavings therefrom were carried by a tube to feed the boiler furnace on the insured premises. *Held*, that this did not amount to a carrying on of the business of sawing and planing lumber on the insured premises.

ACTION on a fire insurance policy. The opinion states the facts. The plaintiff had a verdict which was set aside by the General Term, and the plaintiff appealed.

Robert Sewell, for appellant.

George W. Parsons, for respondent. The change in title avoided the policy. *Barnes v. Un. Mut. F. Ins. Co.*, 51 Me. 110; *Dadmun v. Worcester, etc., Ins. Co.*, 11 Metc. 429; *Springfield F. & M. Co. v. Allen*, 43 N. Y. 389, 394; *Savage v. How. Ins. Co.*, 52 id. 502; *Perry v. Loril. Ins. Co.*, 61 id. 214; *Germond v. Home Ins. Co.*, 2 Hun, 540; *Porter v. Williams*, 9 N. Y. 142; 1 Phil. on Ins., § 880; *Adams v. Rock. Mut. Ins. Co.*, 26 Mo. 292; *In re Carow*, 4 Metc. B. Reg.; *Jones v. Leach*, 1 id. 165; *Pennington v. Sale*, id. 157; *Young v. Eagle F. Ins. Co.*, 14 Gray, 150; *Home Mut. F. Ins. Co. v. Hauslien*, 60 Ill. 521; *McLaren v. Hartford Ins. Co.*, 1 Seld. 151; *Lappin v. C. O. F. Ins. Co.*, 58 Barb. 325; *Starkweather v. Cl. Ins. Co.*, 15 Int. Rev. Rec. 59. The appointment of the receiver changed the possession. *McDonnell v. White*, 11 H. L. 570; *Kerr on Recrs.* 159; *Edwds. on Recrs.* 2-5; *Pars. on Partnership*, 312; *Mitchell v. Bunc*, 2 Paige, 606; *Mann v. Pentz*, L. R., 1 Ch. 251. That the business prohibited was carried on up to the time of the policy, was no excuse for a violation of the contract. *Mead v. N. W. Ins. Co.*, 3 Seld. 530; *Murdock v. Chenango Ins. Co.*, 2 N. Y. 210; *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 587; *Wood v. Hartf. F. Ins. Co.*, 13 Conn. 533; *Lee v. How. Ins. Co.*, 3 Gray, 583; *Bibbetts v. Ham. Ins. Co.*, 3 Al. 569; *Lowell v. Mid. Ins. Co.*, 8 Cush. 127; *Kennedy v. St. L. Ins. Co.*, 10 Barb. 285; *Wall v. E. R. Ins. Co.*, 7 N. Y. 370; *Chase v. Ham. Ins. Co.*, 20 id. 52; *Gilbert v. Phoe. Ins. Co.*, 36 Barb. 372; *Rohrbach v. Ger. Ins. Co.*, 62 N. Y. 47; *Pindar v. Res. F. Ins. Co.*, 47 id. 114; *Sarsfield v. Met. Ins. Co.*, 61 Barb. 479; *Ripley v. Aetna F. Ins. Co.*, 30 N. Y. 161. The proofs of loss were insufficient. *Welcome v. People's Eq. Ins. Co.*, 2 Gray, 480; *Campbell v. C. O. Ins. Co.*, 10 Allen, 213. The furnishing of the preliminary proof was a condition precedent. *Welcome v. People's Ins. Co.*, 2 Gray, 480; *Campbell v. C. O. Ins. Co.*, 10 Allen, 213; *Shawmut, etc., v. People's Ins. Co.*

12 Gray, 535; *Kimball v. Ham. Ins. Co.*, 8 Bosw. 495; *Jube v. B'klyn Ins. Co.*, 28 Barb. 412; *O'Brien v. Com'cl Ins. Co.*, 63 N. Y. 108.

ANDREWS, J. This action is brought by Abner C. Keeney, as receiver of the firm of Keeney & Clarke, upon a policy of insurance issued by the defendant to that firm, covering machinery, tools, fixtures, engine, boiler, and appurtenances and stock, used in their business as manufacturers of bath-tubs and boilers, contained in the brick building and extensions Nos. 637 and 639 West Forty-sixth street, New York city. The firm was composed of Abner C. Keeney, Benjamin F. Clarke and Eliza A. Carroll. The policy was issued January 5, 1871, for one year, and contains a condition that if the insured property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, the policy shall be void. The plaintiff, in February, 1871, brought an action in the Supreme Court against his copartners for a dissolution of the partnership on the ground that it had become insolvent; and by an interlocutory order, made in the action February 15, 1871, he was appointed receiver of the copartnership business and assets, with the usual powers of receivers in such cases, and he was specially empowered to collect, sue for, and recover the debts, demands or property, and pay the debts of the copartnership, and conduct and carry on the copartnership business, until the further order of the court.

The plaintiff's appointment was perfected by giving the security required, and he took possession as receiver of the copartnership property. The firm business, at the time the policy was issued, was managed by the plaintiff and Clarke, the other partner, Mrs. Carroll, taking no active part therein. There was no actual change in the management after the plaintiff was appointed receiver. The plaintiff and Clarke continued to conduct the business as before. On the 21st of July, 1871, the insured property, together with the building on Forty-sixth street, was partially destroyed by fire. The action for a dissolution of the partnership had not at the time of the fire proceeded to judgment.

The principal question presented by this record is whether the appointment of the plaintiff as receiver effected, within the meaning of the condition referred to, a change in the title or possession of the insured property. If it did, the policy was thereby rendered void, and the plaintiff was not entitled to recover.

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A receiver *pendente lite* is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided. The title to the property is not changed by the appointment. The receiver acquires no title, but only the right of possession as the officer of the court. The title remains in those in whom it was vested when the appointment was made. The object of the appointment is to secure the property pending the litigation, so that it may be appropriated in accordance with the rights of the parties, as they may be determined by the judgment in the action. *Skip v. Harwood*, 3 Atk. 564; *Gresley v. Adderley*, 1 Swanst. 573; *Thomas v. Brigstock*, 4 Russ. 65; *Bertrand v. Davies*, 31 Beav. 436; *Green v. Bostwick*, 1 Sandf. Ch. 185; *Singerly v. Fox*, 75 Penn. St. 112; Kerr on Receivers, 158. The appointment of the plaintiff as receiver, therefore, wrought no change in the title of the property. The legal title remained in the copartners, and it was a change in the legal title only which would avoid the policy under the provision that a change of title should make the policy void.

But the condition avoids the policy not only in case of a change of title to the insured property, but also in case of a change of possession, and the question remains whether the appointment of the plaintiff as receiver, and his possession under that appointment, constituted a change of possession within the meaning of the policy. This court, in *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, which was an action upon a policy of insurance upon the stock of a mercantile and commission firm, which contained a condition, that if the property insured should be "sold or conveyed," the policy should be void; *held*, that this provision was not intended to forbid changes of interest among the partners themselves, but related exclusively to assignments and alienations to third persons. In that case the insurance was issued to the firm of Hoffman, Place & Co., and after the policy was issued one of the partners sold his interest in the firm to his copartners, and retired from the business. The action was brought to recover for a loss by fire, which occurred subsequent to the sale by the retiring partner, and the court, in an elaborate opinion by PORTER, J., in which all the judges concurred, overruled the defense based upon the condition against alienation and sustained the recovery. The court regarded the condition against alienation as intended to protect the company against liability, in case of a transfer of the insured property to

strangers to the contract. The company, by issuing the policy, had shown its willingness to insure all the persons composing the firm, and the suggestion, that they might have been unwilling to insure two of them without the other, was considered fanciful and unsound. We think the principle upon which the case of *Hoffman v. Aetna Ins. Co.* proceeded furnishes an answer to the objection in this case based upon the change of possession.

The plaintiff's appointment as receiver had the effect, first, to give him the sole right as between him and his partners to the possession of the firm property; and, second, to change the technical character of his previous possession from that of partner to a possession as receiver. But there was no change in the actual custody of the property, or in the management of the business, and his possession as receiver, in truth, was for his copartners and himself. There was no apparent change in the risk, by reason of the change in the character of the possession. The possession was not given over to a stranger to the contract, and the interest of each partner to protect and preserve the insured property was as great after as before the appointment of the receiver. If the firm, after the policy was issued, had amended the partnership articles, by providing that Keeney should have the sole charge and custody of the partnership property, and that the other partners should in no way interfere or intermeddle therewith, could the defendant have objected to this as a change of possession which avoided the policy. Such a contract between partners might be made (*Blakeny v. Dunham*, 15 Beav. 40); but it clearly would not be a breach of the condition in question. It is not perceived that it makes any material difference that the plaintiff has acquired the right to the exclusive possession by the order of the court rather than by agreement with his copartners. Upon the whole, we are of opinion that the defense, based upon an alleged change of possession, cannot be sustained.

Objection to the recovery is made also upon the ground that the proofs of loss did not comply with the requirements of the policy and that the assured refused to produce their books of account and vouchers for examination. Proofs of loss were served on the defendant on the 15th of August, 1871. They were verified by Clark, one of the firm of Keeney & Clarke. Intermediate the fire and service of the proofs of loss, an appraisal had been made of the property damaged, but not destroyed, by appraisers appointed by

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the mutual agreement of the defendant and other companies having risks on the property, and Keeney & Clarke. Clarke signed the agreement for, and acted in behalf of the firm. The evidence tended to show that the defendant knew at this time that the plaintiff had been appointed receiver. The defendant retained the proofs of loss without objection until the 22d of September, 1871, a period of thirty-eight days, and then notified the firm in writing of certain objections to the proofs, "and that after the proofs of loss shall have been furnished in due form," the company would require the production of their books of account and other vouchers for examination. Some of the objections were frivolous, some were unfounded in fact and the plaintiff without furnishing additional or amended proofs soon after commenced this action. No reason is shown for the delay of the company in objecting to the proofs furnished.

The right of action upon the policy does not accrue, according to its terms, until sixty days after due notice and proof of loss has been served on the company. If the company after waiting thirty-eight days could then make objection to the proofs and require additional proofs, provided there was some formal omission in the proofs furnished, the plaintiff would be compelled to wait for sixty days from the time the new proofs were furnished before bringing his action. The jury would have been justified in finding that the defendant accepted the proofs furnished as sufficient, and waived any objection, which might have been made to them, and as the defendant not only did not ask to go to the jury upon any question of fact but declined to have any question submitted to them, the fact of waiver must be deemed to have been found for the plaintiff. There is no evidence that Keeney & Clarke refused to produce the books of the firm for examination. The notice of the 22d September required their production *after* the proofs of loss called for by the same notice were furnished. There being upon the facts found no obligation upon the plaintiff to furnish additional proofs, the non-production of the books upon his qualified and conditional demand cannot be construed as a refusal to produce them.

The defendant moved at the close of the plaintiff's case, and also at the close of the evidence for a nonsuit on the grounds just considered, and also on the ground that Keeney & Clarke carried on the business of planing and sawing lumber in the premises Nos. 637 and 639 West Forty-sixth street, in violation of the warranty con-

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tained in the policy, that the business carried on, and to be carried on, on these premises, was the manufacture of bath tubs. Assuming that the description in the policy is a warranty that only the business of manufacturing bath tubs was, or should be carried on on the premises, the objection fails for the reason that the proof does not show that the business of planing and sawing lumber was carried on there. It was carried on in the building on Forty-seventh street, and the shavings were conducted by a tube to the boiler room in the Forty-sixth street building, and there used for fuel. This did not constitute a carrying on of the business of planing and sawing lumber on the insured premises.

These views lead to a reversal of the order of the General Term. All concur except EARL, J., absent.

Order reversed and judgment ordered on verdict.

FIRST NATIONAL BANK V. WOOD.

(71 N. Y. 405.)

Negotiable paper — right of accommodation indorser to subrogation.

One who has discounted negotiable paper for the maker cannot be compelled by the accommodation indorser to resort to collaterals belonging to the maker in his hands before resorting to him, although the indorser relied on the collaterals in making such indorsement; although the holder knew of his reliance and that the indorsement was for accommodation; although the proceeds were applied by the holder to payment of other paper of the maker; and although other parties are in the same situation with the indorser. The remedy of the indorser is to pay the paper, and demand and enforce the security.

ACTION against indorser of promissory notes. The facts sufficiently appear in the opinion. The plaintiff had judgment, and defendant appealed.

John Hubbell, for appellant. The plaintiff was confined to the mortgage as the higher security. *At. Bk. v. Franklin*, 55 N. Y. 235; *Hill v. Beebe*, 3 Kern. 563; 1 Bacon's Abr. 396, title Assumpsit; *Saunders on Pldgs. & Ev.*, title Assumpsit; 1 Chitty on Pldgs., title Assumpsit; *Andrews v. Montgomery*, 19 Johns. 163; *Hunt v.*

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Amidon, 1 Hill, 149; *Miller v. Watson*, 5 Cow. 196; *Tyles v. Yates*, 3 Barb. 228; *Landis v. Urie*, 10 S. & R. 320; *Codman v. Jenkins*, 14 Mass. 93; 4 Wend. 270; 2 R. S., art. 5, title 2, part 3, § 153; *Eq. L. Ins. Co. v. Stevens*, 63 N. Y. 342; *Scofield v. Doscher*, 10 Hun, 582; Code, §§ 167, 274; *Wright v. Austin*, 56 Barb. 13, 18, 19; *Soule v. Ludlow*, 6 T. & C. 24; *Mathews v. Aikin*, 1 N. Y. 595; *Vartie v. Underwood*, 18 Barb. 561; *Hayes v. Ward*, 4 Johns. Ch. 122, 131; *N. J. Stbt. Co. v. Associates J. Co.*, 1 Hopk. 460; *King v. Baldwin*, 17 Johns. 384, 404; *Evertson v. Booth*, 19 id. 486-493; *Herriman v. Skillman*, 33 Barb. 378-384; *Warner v. Beardsley*, 8 Wend. 199; *Cary v. White*, 52 N. Y. 138; *Pitts v. Congdon*, 2 id. 352, 354.

George B. Hibbard, for respondent.

MILLER, J. The defendant was an indorser upon the notes in suit, for one Devenport, who kept an account with the plaintiff, and had arranged for a line of discounts, which was secured by mortgages upon real estate. The defendant set up in his answer, and offered to prove that he indorsed said notes for the accommodation of the maker, without any security or protection whatever, except such as was afforded by the mortgages above mentioned, which by their terms were executed and delivered as security for paper of this character; that the plaintiff had full knowledge of the character of the indorsement, and knew that the defendant relied upon the mortgages as the primary fund out of which the debt represented by the notes was to be paid. That the plaintiff did not actually lend or advance any money to the said Devenport on the pretended discounts of the said notes, or any of them, but they were passed to the credit of said Devenport as a mere colorable deposit of money, out of and from which other paper was in form paid and retired, and that the liability and indebtedness was a mere extension and renewal of the original indebtedness secured by said mortgage.

We think that the testimony offered established no defense to the action, and did not entitle the defendant to the equitable relief demanded by the answer. The defendant claims that the mortgage was the primary security for the indebtedness, and the notes mere collateral promises to pay the same debt or liability secured by a lien on the real estate, and no action can be maintained on

the notes, but the remedy must be confined to the mortgage as the higher security. The authorities relied upon to sustain this position do not uphold the doctrine contended for in cases where commercial paper is discounted and collaterals taken to secure the same. The character of such paper is well understood, and it would be overthrowing long-established rules seriously affecting the rights and liabilities of parties to hold that resort must be first had to a mortgage or other instrument taken as a collateral to secure the same. In such cases the money is not loaned on the mortgage, but the mortgage is given merely to make the notes discounted more safe and secure, and, according to the intention of the parties, is not to be considered as the principal debt. Much embarrassment and perplexing complications would arise if holders of such instruments who had discounted paper upon the faith of such security should be compelled to resort to the same primarily for the collection of their demands. It would in fact throw the burden of a litigation upon the party who was intended to be relieved from the same, and tend to thwart the purpose in view. We have been referred to no authority which upholds and sustains any such principle.

While an accommodation indorser may be regarded as surety in some cases, and under certain circumstances, and has all the rights applicable to that relationship, yet as between him and a *bona fide* holder where his liability has become fixed, he becomes the principal debtor, and if he desires the benefit of any security held by the creditor, he must pay up the debt, fulfill the contract and enforce the right of subrogation to the holder as to the securities held by him. See *Ross v. Jones*, 22 Wall. 576, 592; *In re Babcock*, 3 Story, 393, 398, 399.

The indorser cannot compel the holder to sue the maker first, or to enforce his security, and, in the absence of an additional and controlling equity, to resort to a collateral security. The uniform current of authority fully sustains the views expressed, and most of the leading cases bearing upon the question discussed are so fully considered in the opinion of the General Term, that with perhaps some few exceptions further examination of the cases is not required.

As to the *Atlantic Bank v. Franklin*, 55 N. Y. 235; *Powers v. French*, 1 Hun, 582, and some other decisions cited in connection with them to sustain the position that the plaintiff was not entitled

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to the rights of a *bona fide* holder without notice, by passing the proceeds of the discount to Devenport's credit, it is perhaps sufficient to say that they are not in point, and each of them presents entirely a different state of facts from that which arises in the case at bar. The notes in question were used by Devenport in his dealings and business with the plaintiff, and there is no valid ground for the assumption that the discount of them was fictitious, or a mere matter of form, or that the business was in any respect conducted differently from the ordinary and accustomed mode pursued in similar transactions.

Several cases are cited by the appellant's counsel, which were not especially considered by the General Term, to sustain the doctrine that a surety may compel the creditor to sue for and collect the debt of the principal debtor, or to exhaust his collateral before resort is had to the surety. *Wright v. Austin*, 56 Barb. 13; *Soule v. Ludlow*, 6 N. Y. Sup. (T. & C.) 24; *Mathews v. Aikin*, 1 Comst. 595. In each of those there was some special equity, or some agreement which took them out of the general rule hereinbefore referred to, and which does not in any way interfere with the same. Upon circumstances like those here presented, it can scarcely be claimed that the surety would be entitled to the enforcement of the rule contended for, without an offer on his part to pay the expenses which might necessarily be incurred by this course of procedure.

The remedy of the defendant, in accordance with the views expressed, clearly was to pay up the indebtedness to the plaintiff, thus asserting his right to be subrogated, and to take under his control and enforce the securities in question. The fact that other parties besides the defendant occupied the same position as he did, and were interested to the same extent, or in a similar manner in enforcing the security, presents no valid objection to requiring that the defendant should adopt such a course, for he could only avail himself of such benefit as is really conferred by the securities, and that they are an advantage to some one else besides himself does not impose upon the plaintiff the costs and expenses of prosecuting them before bringing an action against the indorser. The defendant in claiming the right of subrogation can only take the securities as they actually are, with their burdens and advantages, and beyond this he has no rights and no valid claim for protection.

The offer of the defendant to prove the taking of excessive interest in the transactions between the plaintiff and Devenport, and a

greater rate than is allowed by the laws of this State, was properly refused. The proposition embraced transactions with which the defendant was not connected, and therefore the offer was too broad and comprehensive. Had it been confined to transactions between the plaintiff and Devenport, with which the defendant was connected, and to the notes indorsed by him, a more serious and difficult question would arise, but in the form in which the offer was made the point raised is not in the case.

The alleged parol agreement in regard to the release, prior to its execution, was properly excluded by the court for the reason that it would contradict and vary the terms of the release as well as the notes.

No other question raised demands discussion. and the judgment should be affirmed with costs.

All concur, except CHURCH, C. J., absent.

Judgment affirmed.

COWING V. ALTMAN.

(71 N. Y. 435.)

Check for illegal consideration — rights of bona fide purchaser.

Pursuant to an arrangement between an assignee and the creditors in bankruptcy, a check to his order, and dated the day it was drawn, was deposited with a third person, for delivery to the payee, on his discharge as assignee. Fourteen months afterward, on such discharge, it was delivered upon the order of the assignee, to a *bona fide* purchaser. In an action on the check by such holder, against the drawer, *held*, (1) that although invalid in the hands of the payee, it was valid in the plaintiff's hands; (2) that it had no inception until it was delivered to the payee, and the plaintiff was not put upon inquiry as to its prior date.

ACTION on a check, dated March 8, 1871, drawn by defendant to the order of Edwin A. Holbrook, and indorsed by him, and protested May 3, 1872. The payee was an assignee in bankruptcy, discharged at the latter date. The other facts appear in the opinion.

Sherman S. Rogers, for appellant.

E. C. Sprague, for respondent. The agreement with Holbrook

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was void. *Hatch v. Mann*, 15 Wend. 44; *Gray v. Hook*, 4 N. Y. 449; *Bell v. Leggett*, 7 id. 176; *Staples v. Gould*, 9 id. 520; *Griffith v. Wells*, 3 Den. 226; *Barton v. P. J. P. R. Co.*, 17 Barb. 397; *Sanderson v. Goodrich*, 46 id. 616; *Nodine v. Doherty*, id. 59; *Brown v. Tarkington*, 3 Wall. 377; 2 Chitty on Cont. (11th Am. ed.) 97. The check could not be made valid by the subsequent agreement. 2 Chitty, 971-973; *In re Davenport*, 3 B. R. 77; *In re Pegues*, id. 80; *In re Tully*, id. 82; *Curtiss v. Leavitt*, 15 N. Y. 9; *Leavitt v. Palmer*, 3 id. 19; *Gray v. Hook*, 4 id. 449. The fact that the check was dated over fourteen months prior to its delivery to the bank was sufficient to put the bank on inquiry. *Cowing v. Altman*, 1 T. & C. 494; *Down v. Halling*, 4 B. & C. 330; *Brooks v. Mitchell*, 9 M. & W. 15; 1 Pars. on Bills and Notes, 271; 2 id. 71, 278, 279; *Herrick v. Woolverton*, 41 N. Y. 581; *Loses v. Durkin*, 7 Johns. 70; *Sice v. Cunningham*, 1 Cow. 397, 407; *Morey v. Wakefield*, 41 Vt. 24; *Little v. Phœnix Bank*, 2 Hill, 426; *Alexander v. Burchfield*, 7 M. & G. 1061; *Weathere v. Smith*, 9 Tex. 622; *Vairin v. Hobson*, 8 La. 55; *Brown v. Taber*, 5 Wend. 566.

ANDREWS, J. We shall assume that the check in suit was given to carry out an agreement made in contravention of the forty-fifth section of the bankrupt act, for the payment to Holbrook of a compensation beyond the legal fees allowed by law for services as assignee in bankruptcy of the firm of Biesenthal, Falck & Israel, and was void in the hands of the payee by reason of the illegality of the consideration. But the bankrupt act does not expressly avoid a note or security taken upon such a transaction, and the check, notwithstanding the illegality of the consideration, would be valid in the hands of a *bona fide* holder for value, who took it before it was dishonored, without notice of the illegality. *Rockwell v. Charles*, 2 Hill, 499; Byles on Bills, 139.

The Marine Bank was a holder for value. It received the check from Clark in payment of a note of the firm of Clark & Hazard, held by the bank, of the same amount, and the bank surrendered the note when it received the check. This was a parting with value. *Brown v. Leavitt*, 31 N. Y. 113. It must be assumed, in the absence of proof to the contrary, that the bank had no notice of the illegality of the check when it acquired title. The transferee for value of a negotiable instrument, tainted by fraud or illegality in its inception, to maintain his action, is not bound to

show, in addition to the fact that he received it for value before due, that he had no notice of the original infirmity in the paper. The burden of showing notice is upon the party who seeks to impeach his title. *Goodman v. Harvey*, 4 Ad. & E. 870; Byles on Bills, 118. But it is claimed that the check was dishonored when it was passed to the bank; and if this claim is well founded, then, as Holbrook, the payee, could not have recovered upon the check, neither can the bank, unless it can make an independent title under an intermediate holder, who purchased it for value and without notice before it was dishonored. But Clark's title was no better than that of the bank. He transferred the check to the bank on the same day he received it, and if it was dishonored when the bank took it, it was also dishonored when it was received by Clark.

The claim by the defendant, that the check was dishonored when it came to the possession of the bank, rests upon the fact that it was dated March 8, 1871, about fourteen months before the time the bank received it. That such a lapse of time between the date and transfer of a check affords a just presumption of dishonor cannot, we think, be doubted. The date of a note or check is *prima facie* evidence of the time it was made and had its inception. Chitty on Bills, 148; Byles on Bills, 77. And a check found in the hands of the payee or third person fourteen months after its date, in the absence of explanation, must be deemed to be discredited. It would not necessarily be implied, from the mere lapse of time, that a check had been dishonored in fact; that is, that it had been presented and that payment had been refused, or that it was overdue, in a strict sense. Usually no time of payment is expressed. It is payable presently, but the holder must in general demand payment of the drawee before he can sue the drawer, and the statute of limitations runs from that time. *Murray v. Judah*, 6 Cow. 484. But the retention of a check by the holder for a considerable time, without presentment, where no defense exists to it, is unusual, and this circumstance is sufficient to put a party taking it upon inquiry, and a check dated as in this case, several months before its transfer, and which might have been presented at or soon after its date, will, in the absence of explanation, be treated as overdue and dishonored, whether it has been actually presented or not, so as to let in defenses existing between the drawer and payee. *Gough v. Staats*, 13 Wend. 549; *Little v. The Phenix Bank*, 2 Hill, 425; *Down v. Halling*, 4 B. & C. 330; Daniels on Neg. Instruments, § 1633.

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But the date of a check or note is only presumptive evidence of the time it was issued. A check or note has no inception until delivery, and for all legal purposes it is to be considered as made on the day it is delivered. *Lansing v. Gaine*, 2 Johns. 300. And when the date and the time of delivery are not coincident, the time when it in truth has its inception may be shown in answer to the plea of infancy or coverture, or to avoid the imputation that it was dishonored when received by the holder. *Pasmore v. North*, 13 East, 517; Story on Notes, §§ 48, 491; Daniels on Neg. Inst. 65; *Boehm v. Sterling*, 7 T. R. 423; *Drake v. Rogers*, 32 Me. 544. In *Boehm v. Sterling* the defendants had delivered their check nine months after it bore date. Some time thereafter it was negotiated by the holder to the plaintiffs, who took it for value, and in good faith. As between the original parties there was a defense, and it was claimed that the plaintiffs took with notice of dishonor, and subject to the equities between the original parties, simply because they had taken the check so long after it bore date. Lord KENYON said: "All the difficulty is occasioned by the defendants themselves, who issued this bill with the objection, of which they now seek to take advantage, appearing on the face of it; but I am clearly of opinion on principles of law as well as justice, that it was not competent for them to take this objection." The defense was overruled, and the verdict for the plaintiffs was sustained. The case here is within the principle of *Boehm v. Sterling*, and the other cases we have referred to. It was admitted that the check was made on the day it bears date, and by an agreement between Altman and the payee was deposited with one Bowen for safe-keeping, and to be delivered to Holbrook when he was discharged from his position of assignee in bankruptcy of Biesenthal, Falck & Israel; that it remained in the hands of the depository until May 2, 1872, on which day Holbrook was discharged, and on the same day Bowen delivered it on Holbrook's order to Clark, who immediately transferred it to the bank, and on the next day it was presented for payment, and payment was refused. The delivery by Bowen was in pursuance of the authority vested in him by the drawer, which so far as appears had never been revoked. It is the case, therefore, of a check delivered by the drawer (through his agent), long after its date to the payee, and on the same day transferred to a *bona fide* holder for value, without notice of any defense. The check when it was taken by the bank appeared to be overdue,

and the bank took the risk of the apparent fact being also the real fact. If the bank before taking the check, on noticing the date, had inquired and ascertained that the drawer had delivered the check on the day the bank received it, the apparent objection to the check would have been removed. This information would have shown that in fact it was not overdue or dishonored, nor would the bank have been bound to go further. Take the case of a check negotiated on the first day of January of one year, dated on the first day of January of the preceding year. If the party taking it from the holder had upon inquiry been informed that it was delivered to him on the day it was negotiated, and this was the fact, would he be bound to go further, and inquire whether there was not some other objection to the check? We think not. He would have relieved the paper of the only suspicious circumstance attending it. He would take the risk of the information not being true, and this is all; and although he made no inquiry, if he took the check *bona fide* for value, without notice of illegality or other defense, and it turned out that it was in truth issued on the day it was negotiated, he would stand in no worse position than if he had first inquired and been informed that it was so issued. In either case he took the risk only of the fact being true, which appeared to be true on an inspection of the paper, viz.: that it was overdue and dishonored. If it was not true, and the paper was not overdue, his title would be protected, there being the other elements of a *bona fide* holding.

Upon the authorities and the reason of the matter, we think this judgment should be reversed. The plaintiff as the transferee of the bank stands upon its title.

The judgment should be reversed and new trial granted.

All concur.

Judgment reversed.

COUGHLIN v. N. Y. C. & H. R. R. R. Co.

(71 N. Y. 442.)

Agreement to compensate attorney—interest in non-assignable cause of action.

A, having sustained personal injuries by the negligence of B, employed C as attorney to sue therefor, upon the agreement that C was to have a certain proportion of any recovery for his compensation. C notified B of the arrangement. The suit was brought, and C settled with A, and obtained his release. *Held*, that such release was a bar to the action.

ACTION for personal injuries occasioned by defendants' negligence. The opinion states the facts. The defendant had judgment which was reversed at General Term.

A. P. Laning, for appellant.

John C. Strong, for respondent.

EARL, J. On the 13th day of January, 1874, the plaintiff was injured while a passenger on defendant's railroad, and was removed to his home in Buffalo. The next day one of plaintiff's attorneys, Mr. Strong, called upon him and told him somebody had sent him there. He was a stranger to the plaintiff, and plaintiff had not sent for him. He asked the plaintiff if he wished him to take his case against the defendant. The plaintiff replied that he had no money to go to law with the defendant. Strong then said if plaintiff and he could agree, he would furnish the money to go on with the suit and asked him if he was satisfied to have him sue the defendant and go on with the suit, and he said he was. Strong said he would collect all he could, and for his pay he wanted half of what he should collect, and the plaintiff assented to this. Strong then drew up and the plaintiff executed the following instrument:

"This may certify, that I have retained Goodyear & Strong to sue for, recover and arrange a claim I have against the New York Central & Hudson River Railroad Company, and the said Goodyear & Strong are to find all the money necessary to carry on said case, and shall divide with me the damages which may be recovered; and if nothing is recovered they shall have nothing for their services. Consideration, one dollar."

On the next day, after the execution of this paper, this suit was commenced by the service of a summons. At the time of such service notice was given to the defendant that the attorneys were interested in the cause of action, for their services to the extent of one-half thereof. Subsequently the plaintiff called at the office of defendant's attorneys and offered to settle his claim, and after some negotiation, the plaintiff asserting that he had done nothing to deprive himself of the power to settle, it was agreed that the defendant should pay him in full settlement of his claim against it \$1,000, and this sum was paid. Plaintiff's attorneys thereafter served the complaint in this action, and defendant's attorneys served the answer setting up the settlement in bar of the action.

The referee found among other things that the defendant's attorneys acted in good faith, having no knowledge of the agreement between plaintiff and his attorneys, but that the settlement was nevertheless fraudulent and collusive as against plaintiff's attorneys. He decided that the settlement was a bar to the action and the plaintiff's attorney had no right to prosecute and maintain the action for the sole purpose of reaping the fruits of their agreement with their client. We believe this decision to have been right. It is certainly a general rule that parties to an action may settle the same without the intervention of the attorneys. Generally, a plaintiff who has a cause of action against a defendant may release and discharge it upon such terms as are agreeable to him. This he may do while the action is pending, and after judgment he may cancel and discharge the judgment. In all this generally he infringes upon no privilege and violates no right of his attorney. But since the time of Lord MANSFIELD, it has been the practice of courts to intervene to protect attorneys against settlements made to cheat them out of their costs. If an attorney has commenced an action, and his client settles it with the opposite party before judgment, collusively, to deprive him of his costs, the court will permit the attorney to go on with the suit for the purpose of collecting his costs. *Swain v. Senale*, 5 Bos. & Pul. 99; *Cole v. Bennett*, 6 Price, 15; *Morse v. Cook*, 13 id. 473; *Talcott v. Bronson*, 4 Paige, 501; *Rasquin v. The Knickerbocker Stage Co.*, 12 Abb. Pr. 324; *Ward v. Syme*, 9 How. Pr. 16; *McDonald v. Napier*, 14 Ga. 89.

There are many cases where this has been allowed to be done. It is impossible to ascertain precisely when this practice commenced, nor how originated, nor upon what principle it was based. It was

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not upon the principle of a lien, because an attorney has no lien upon the cause of action, before judgment for his costs; nor was it upon the principle that his services had produced the money paid his client upon the settlement, because that could not be known. and in fact no money may have been paid upon the settlement. So far as I can perceive, it was based upon no principle. It was a mere arbitrary exercise of power by the courts; not arbitrary in the sense that it was unjust or improper, but in the sense that it was not based upon any right or principle recognized in other cases. The parties being in court, and a suit commenced and pending, for the purpose of protecting attorneys who were their officers and subject to their control, the courts invented this practice and assumed this extraordinary power to defeat attempts to cheat the attorneys out of their costs. The attorneys' fees were fixed and definite sums, easily determined by taxation, and this power was exercised to secure them their fees.

After judgment, the attorney who has procured it has a lien upon it for his costs. This lien is upheld upon the theory that the services and skill of the attorney have procured the judgment. There is, then, something upon which a lien can attach, and the courts uphold the lien by an extension to such cases of the principle which gives a mechanic a lien upon a valuable thing which, by his skill and labor, he has produced. Cross on Liens, 216, 220, 226; *Ormerod v. Tate*, 1 East, 464; *Reed v. Dupper*, 6 T. R. 361; *Mitchell v. Oldfield*, 4 id. 123; *Turwin v. Gibson*, 3 Atk. 719; *Ward v. Syme*, *supra*. If notice be given of this lien, then the defendant in the judgment cannot defeat it by a clandestine or collusive payment to the plaintiff.

Before our Code of Procedure, I believe, there was no case where the lien was upheld for more than the taxable costs. But the Code (section 303) provides that "all statutes establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions and all existing rules and provisions of law restricting or controlling the right of a party to agree with an attorney, solicitor or counsel for his compensation are repealed; and hereafter the measure of such compensation shall be left to the agreement, express or implied, of the parties;" and now it is held that after judgment an attorney may have a lien thereon for any compensation which his client has agreed to pay him, and to that extent it is said he may be regarded as an equitable assignee of the judgment. *Rooney*

v. *Second Ave. Railroad Co.*, 18 N. Y. 368; *McGregor v. Comstock*, 28 id. 237; *Ely v. Cooke*, id. 365; *Marshall v. Meech*, 51 id. 140; 10 Am. Rep. 572; *Wright v. Wright*, 70 id. 98.

A person owning a judgment for the recovery of money may give his attorney, or any other person, by agreement, rights and equitable interests therein, which the defendant therein charged with notice must respect. So if the cause of action before judgment be in its nature assignable, the owner of it may assign and, by agreement, create legal and equitable interests therein, and such agreements may now be made with his attorneys as well as with other persons, and when such interests have been created and notice given of them they must be respected. But what I maintain is, that before judgment, in the absence of any agreement, the attorney has not now and never had any lien upon, or interest in, the cause of action; and when the cause of action is like this, such as by its nature is not assignable, the party owning it cannot by any agreement give his attorney or other person any interest therein. In *People v. Tioga C. P.*, 19 Wend. 73, COWEN, J., said: "Assignments of personal injuries must still be regarded as mere covenants or promises which we cannot directly protect against the interference of the immediate party, though the defendant have full notice of the effort to assign. If the person professing to assign will do prejudice to the right by extinguishing or impairing it, the party with whom he deals must be left to his action for damages according to the nature of the undertaking." Mere personal torts of this kind cannot be separated from the person upon whom they are inflicted, and they die with him.

Here there was not even any agreement by plaintiff to assign any portion of the claim to his attorneys. The agreement executed did not purport to give them any present interest in the cause of the action. It was simply an executory agreement that the attorneys should share in the damages recovered, the cause of action remaining intact in the plaintiff. Still an agreement to divide the recovery in such a case would attach itself to the judgment when recovered, and give the attorney an equitable interest therein.

It is, therefore, beyond dispute that the plaintiff's attorneys had neither a legal nor equitable interest by way of any assignment or lien on the cause of action. The defendant was not asking any favor of the court. It was in court simply insisting upon its settlement with the plaintiff as a defense to his cause of action. There-

fore, if the attorneys are entitled to the protection they now seek, it is only by the exercise of the extraordinary power of the court to which I have first above alluded, and I am prepared to say that such power should not be exercised in a case like this. It has not been conferred upon the courts by statute, usage or common law. Its exercise to secure to an attorney the statutory fees, small in amount and easily ascertainable, was just and proper, and could lead to no abuse. But to exercise it so as to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through, and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person not a lawyer would have been, if he had taken the same contract. When a party has the whole legal and equitable title to a cause of action, public policy and private right are best subserved by permitting him to settle and discharge that, if he desires to, without the intervention of his attorneys.

The conclusion I have thus reached is sanctioned by the case of *Pulver v. Harris*, 62 Barb. 500; s. c., 52 N. Y. 73. That was an action for assault and battery and plaintiff recovered a judgment, which he assigned to his attorney to secure his costs, and notice of the assignment was given to defendant. Defendant appealed, and the judgment was reversed. The action was then noticed for trial, but before the Circuit the parties settled, and plaintiff executed to defendant a release. Notwithstanding this, plaintiff's attorney moved the trial of the action when it was reached upon the calendar. Defendant's counsel produced the release, but that was disregarded by the court as in fraud of the attorney's rights, and the action was tried, and a report made for plaintiff by default for fifty dollars and costs. This report upon motion on behalf of defendant was set aside, the court holding that plaintiff's attorney as against the defendant had no lien, either legal or equitable, which could affect the settlement. This court held that the cause of action was not assignable, and that after the reversal of the judgment the assignment thereof became inoperative, so far as the defendant's rights were concerned; and that, as to him, the cause of action belonged to the plaintiff, which he could not transfer, and which remained subject to his control until merged in a judgment, or at least in a verdict. It was properly said in that case,

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that the assignment of a judgment would also include the cause of action upon which it was rendered, in case of a subsequent reversal if the latter was assignable, and the case was treated as if the attorney had had a formal assignment of the cause of action. Judge GROVER said: "It may be said that although the plaintiff was the owner of the cause of action, and as such had a right to control and settle the suit, yet, the defendant, knowing that the attorney relied upon the fruits of the action as security for the services, ought to have paid the money to him, instead of the plaintiff, upon the settlement. The answer to this is, that the attorney, having no legal or equitable lien upon the cause of action, the defendant had the right to pay the money to the plaintiff, to whom it belonged, and was not bound to take care of the interests of the attorney."

It cannot be claimed that plaintiff's attorneys here were in any better condition with the agreement which they took from plaintiff than they would have been if they had had a formal assignment of the whole cause of action to secure them for their services, and yet, as as is seen by the case cited, such an assignment would have given them no right to defeat the settlement which these parties made.

[Omitting a statutory ground.]

Upon both grounds, therefore, the order of the General Term must be reversed, and the judgment on the report of the referee affirmed, with costs.

RAPALLO and ANDREWS, JJ., concur; FOLGER, J., concurs on first ground; CHURCH, C. J., concurs in result; ALLEN, J., did not sit; MILLER, J., not voting.

Order reversed and judgment affirmed.

Judgment affirmed.

LEONARD V. CITY OF BROOKLYN.

(71 N. Y. 498.)

Mechanics' lien — municipal property.

Unless expressly authorized by statute, a mechanics' lien cannot be enforced against real estate belonging to a municipal corporation, and in public use.
(See note, p. 83.)

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ACTION to enforce a mechanics' lien. The opinion states the facts. The defendant had judgment on demurrer, and the plaintiff appealed.

James Troy, for appellant. The common-law rule applicable to the sovereign power of the State does not apply to a mere municipal corporation. 14 Alb. L. J. 69, 100, 113, 118, 177.

William C. DeWitt, for respondent.

MILLER, J. This action was brought to enforce a mechanics' lien for labor and materials furnished by a sub-contractor in the erection of a "fire-bell tower" in the city of Brooklyn. The alleged lien arises under the provisions of chapter 478 of the Laws of 1862, which relates to mechanics' liens in the counties of Kings and Queens. This act, among other things, provides for instituting and prosecuting an action after filing service of notice of the lien, the same as other civil actions to enforce the lien, and declares "that such action shall be governed, and the judgment thereon enforced in the same manner as upon issues joined and judgments rendered in all other such civil actions aforesaid." It thus places the proceedings and the judgment upon the same basis as in actions to enforce any other lawful demand, and the plaintiff occupies no better or different position than any other creditor who holds a demand against a municipal corporation, and must be governed by the same rules. In *Darlington v. The Mayor*, 31 N. Y. 164, it is laid down by DENIO, J., that property held by a municipal corporation for public use, such as public edifices or their furniture, or ornaments, or the public parks, or grounds, or such as may be legally pledged for the payment of its debt, is not subject to seizure and sale on execution. The reason stated why this cannot be done is that these structures, etc., are public property, devoted to specific public uses, in the same sense as similar subjects in the use of the State government. It is claimed that the remarks of the learned judge must be regarded as *obiter dicta*, so far as the question presented in this case is concerned. We think that they relate to the subject then under consideration, the liability of a municipal corporation for its debts, and are based upon a sound principle. It is very evident that it would not be consistent with a safe and judicious administration of the affairs of a city, as well as an entire

disregard of the objects of a municipal government, to allow its property, held for public use, to be subject to levy and sale by execution for the debts of the corporation at the instance of a creditor. Such property is held by the corporate authorities, which constitute a part of the government, for the use, benefit and protection of its citizens. It is purchased with money realized by taxation on the property of the inhabitants, and is held in trust for the purpose of administering the government of the city, and if allowed to be seized and appropriated by a private creditor in satisfaction of a demand of such creditor, would fail to answer the purposes for which it was designed, and seriously interfere with and impair the practical workings of the municipal government in the discharge of its legitimate functions. It would sanction neglect of official duty in the officers of the corporation, and might lead to the most serious consequences.

It is easy to see that great inconvenience and even injury might result to the public from a forced sale of corporate property, as well as to the property of individuals within the limits of the corporation. No corresponding advantage would be gained by any such proceeding, and in the absence of any express authority to that effect, no reason exists why claims of the character of the one in controversy should stand upon any better or different footing than any other which exist against a municipal corporation, where judgment can be obtained and execution issued against such of the property of the corporation as is liable to levy and sale under the same. According to the express language of the act cited, the judgment is to be enforced the same as in other actions, and hence it would be inconsistent with this condition to allow such judgment to be collected by a sale of a "fire-bell tower" designed for public use, and which was erected upon land belonging to the corporation.

If judgments in other actions cannot be enforced by the sale of public property, for the reason that public exigencies require that such property should be exempt from seizure and sale, certainly a judgment obtained under the lien law, which is the mere foreclosure of the notice which had previously been served and filed for work done for the benefit of the city, should stand in no better position. The act in question confers no special advantage, nor does it give a preference to a lien in any such case, and nothing is to be intended in favor of an enactment which interferes with a

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well-established principle, and changes a rule which has long been settled. To make such a material alteration, the law should be plain, explicit and clear, and there is no ground for holding that it was the intention of the law-makers to confer upon a certain class of creditors the right to a lien upon property held for public use by a municipal government unless there is an express provision to that effect. The statute does not include such a case either in terms or by necessary implication.

As the plaintiff's demand cannot be enforced as a mechanics' lien upon the property held for public use by the corporate authorities of the city of Brooklyn, which is claimed to be liable therefor, upon any legal ground, the judgment must be affirmed.

All concur.

Judgment affirmed.

NOTE BY THE REPORTER.—The question in *Darlington v. Mayor*, 31 N. Y. 164, cited as the basis of the principal case, was the constitutionality of the act compensating parties whose property may be destroyed in consequence of mobs or riots, passed April 13, 1853, and in considering that question it was incidentally held that judgments pursuant to the provisions of that act, for riot damages, have the same force against the property of the city, as judgments recovered for any other cause of action. On that point the court say: "It is plain enough that it would not be a judicious administration of the affairs of a city to permit its property to be subjected to a forced sale on execution; and hence it has become a usual practice to add to the sums included in the annual tax levy any amount for which judgments have been recovered against the corporation, and to authorize the borrowing of money if necessary, in order to pay such judgments. Instances of such legislation occur in many of the recent statutes. A municipal corporation, equally with a private corporation, may have its property taken in execution, if payment of a judgment is not otherwise made. I am far from supposing, however, that such estate, real or personal, as may by law, or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture or ornaments, or the public parks or grounds, or such as may be legally pledged for the payment of its debt, can be seized to satisfy a judgment. Such clearly cannot be the case, for these structures are public property, devoted to specific public uses, in the same sense as similar subjects in the use of the State government. The argument that I am examining supposes that the city may possess other property, held for purposes of income or for sale, and unconnected with any use for the purposes of the municipal government. Such property, the defendants' counsel insists, and for the purpose of the argument I concede, is liable to be levied on and sold to satisfy a judgment rendered against the city corporation." "Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable for sale only to private persons for building purposes or the like: No one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to some municipal or other public purpose within the city, as a court-house, a hospital or the like; and yet, if the argument on behalf of the defendants is sound, it would be the taking of private property for public use without compensation, and the act would be void."

Since the principal case arose the question has lost much of its significance in this State, for a statute has been enacted, granting a lien on moneys in the treasury for municipal public work. Laws of 1878, ch. 815.

The doctrine of the principal case is substantially sustained by *Chicago v. Hasley*, 36 Ill. 555; *Crafts v. Ellitsville*, 47 Me. 141; *Forster v. Fowler*, 60 Penn. St. 30; *Davenport v. Ins. Co.*, 17 Iowa, 276; *President v. Indianapolis*, 12 Ind. 630; *Gus v. Tidewater*, 94 How. 563; *Bewart v. Jones*, 40 Mo. 140.

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In some other States beside New York the matter is regulated by statute. Indeed, it is claimed by Mr. Jenks, whose learned argument is cited as the appellant's authority in the principal case, that the doctrine is otherwise at common law. He says (14 Alb. L. Jour. 179):

"From Maine to California, and thence to Oregon, Utah and Arizona, exemption is made by statute of public buildings, such as court-houses, jails, etc. See R. S. Maine, 1871, pp. 129, 667; Cal. Civ. Code, § 1241, p. 225; and Gen. Laws, vol. 2, Sup. p. 9131; Arizona Compiled Laws, ch. 37, p. 340; Oregon Gen. Laws, 164-5. In almost every State, except this, provisions are made by statute for the exemption of a certain class of property from levy and sale on execution. In Missouri, for instance, all court-houses, jails, clerks' offices, and other public buildings, and the lots of ground on which they stand, shall be exempt from attachment and execution when owned by the county in which they are situated, or any municipal corporation therein; also all burial grounds, specified in chapter 11 of these statutes. Wagoner's Mo. Stat., vol. 1, 1870, p. 604, § 10; id. 294-5, §§ 29 and 34. Hence the decision in *Stewart v. Jones*, 40 Mo. 140.

"But these identical two cases (*Stewart v. Jones* and *Gue v. Tide Water, etc.*) are the foundation of the doctrine in all the books, that property of a municipal corporation is not subject to levy and sale on execution, unless made so by statute (except, perhaps, Ang. & A. p. 658, where they are made a foot-note)."

And also 14 Alb. L. Jour. 102:

"We challenge any proof, or authority, to the effect that such a doctrine, independently of statutory enactments, prevails in any State of the Union. While quite the opposite has been held in several of the States under statutory enactments, or otherwise, the rule is exclusively Pennsylvanic; and it is more than probable that *Brinkerhoff v. Mayor, etc.*, follows *Gue v. Tide Water, etc.*, *infra*, in theory, which last decision was based upon laws peculiar to Maryland and Pennsylvania, and upon decisions of courts of the latter State (before cited, p. 34); a State in which 'the principles which the English Court of Chancery has adopted respecting charitable uses under the statute of Elizabeth obtain, not indeed by force of the statute, but a part of its common law' (A. & A. on Corp. 150); and where, nevertheless, it is held a church edifice is subject to a mechanic's lien, but not the graveyard on which it stands, because 'the building was designed for the worship of God—the ground for the burial of man; the one for the edification of the living—the other as a receptacle for the dead. The purposes, although combined, are entirely distinct in their nature: and it was, therefore, error to include the graveyard as subject to the lien.' *Beam v. First Meth., etc.*, cited *supra*.

Mr. Jenks says of *Gue v. Tide Water*, 14 Alb. L. J. 178, that it was there held, "that the franchise, or right to take toll on boats going through the canal, would not pass to the purchaser under that execution, a *fieri facias* issued to the United States marshal for the district of Maryland. The court say that "the franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *fieri facias*; if it can be done in any of the States, it must be done under a statutory provision of the State.

* * * That if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely any thing from the useless canal locks and lots adjoining them. The records and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise; and it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders by disavowing from the franchise property which was essential to its useful existence. In this view of the subject, and the court do not deem it proper to express any opinion as to the right of this creditor in some other form of judicial proceeding to compel the sale of the whole property of the corporation including the franchise for the payment of his debt. * * *

If the appellant has a right to enforce the sale of the whole property including the franchise, his remedy is a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object."

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This case not only arose in Maryland, where the statutes of mortmain and disabling statutes also were received, and where "real estate was not liable to be taken and sold on execution, at the suit of a citizen, until made so by statute."

In *Gooch v. Gregory*, 65 N. C. 133, 144, Justice DIX, delivering the opinion of the court upon the question, whether an execution may issue on a judgment against a county, says (citing ch. 20, act of 1868): "Thus it appears that a county can only acquire and hold property for necessary public purposes, and for the benefit of all its citizens; and the plainest principles of public policy prevent such property from being sold under execution for the advantage of an individual. Bouv. Inst. 178. These rules of law are not applicable to a municipal corporation, created by a charter which is voluntarily accepted by the corporation for private emolument and advantage. Such corporations are sometimes charged with the performance of public duties; but so far as the grant is for private purposes and advantage, they are regarded as private corporations and subject to like liabilities." Citing *Bailey v. Mayor of N. Y.*, 3 Hill, 581; *Dartmouth College v. Woodward*, 4 Wheat. 519.

But Mr. Justice WALKER, in *City of Chicago v. Hasley*, cited ante, says, in dissenting: "After a careful examination and a mature consideration of the reasons presenting themselves to my mind, I am unable to concur in the conclusion at which my associates have arrived in this case. Owing to the importance of the question involved, I feel constrained to present a portion of the reasons which have led me to the conclusion at which I have arrived. These bodies (municipal corporations), like ordinary corporations, derive all their powers from the sovereignty of the State, and are completely under its control. They are, it is true, created alone for the better government of the local division to which their jurisdiction is confined, and that jurisdiction may be curtailed or enlarged at pleasure by the legislature. The object of their organization is not the advancement of individual gain, commercial enterprise, or pecuniary interest, either of individuals or the body politic. This seems to be the distinguishing feature between bodies of this description and private corporations, which are usually created for some, if not all, of those purposes. As municipal corporations are created alone for public, and not for private benefit, it may constitute a cogent reason why the legislature should exempt their property from sale on execution, or that such process should not issue against them, but does not, as I conceive, create the exemption. If such an exemption exists, I feel confident that it is not by the common law. After a careful search of all the elementary books and reports of adjudged cases which have come within my reach, I am unable to find such a rule has ever been announced. I find at the common law that they were liable to be sued and judgment rendered against them precisely as if they were corporations created for private purposes. When it is remembered that the execution is the fruit of the judgment, if such an important exception existed, it would certainly have been announced, either in Great Britain or some of the States of the Union. To my mind, the fact that the question has never arisen, is conclusive that such an exception does not exist at common law. On the argument it was urged that, as the legislature has provided that execution shall not issue upon judgments recovered against counties, for the same reason municipal corporations were designed to be embraced. To my mind, it is only necessary to refer to the rule of interpretation, that the expression of one thing is the exclusion of another, as a complete answer to this position. If cities, towns, villages, or other such bodies, had been designed to be embraced, it seems to my mind that very different and more appropriate language would have been employed."

BROWNING V. HOME INSURANCE CO.

(71 N. Y. 509.)

Fire insurance — warranty of occupation — concealment.

The description in a fire insurance policy, of a building insured, as a "dwelling-house," is not, in the absence of misrepresentation or concealment as to the fact of occupation, a warranty that the building is occupied as a dwelling,* and the omission of the applicant to disclose the fact that the building is vacant, in the absence of any inquiry on that point, is not a breach of a condition that any omission to make known every material fact shall avoid the policy.

ACTION on a policy of fire insurance, insuring a "dwelling-house," loss payable to the plaintiff, as mortgagee. The policy contained a provision that "any omission to make known every fact material to the risk, either in a written application or otherwise," should render the policy void. The premises were vacant when insured, and so continued till destroyed by the fire. The insured did not inform the company of the fact of such vacancy. The plaintiff had judgment.

E. B. Convers, for appellant. The description of the premises as a dwelling-house was a warranty that it was occupied. *Alexander v. Ins. Co.*, 66 N. Y. 464; *O'Neil v. Buff. F. Ins. Co.*, 3 id. 122. The neglect of the insured to disclose the fact that the house was vacant was a breach of the condition that any omission to make known every fact material to the risk should render it void. *Magnin v. Dinsmore*, 62 N. Y. 35, 40; *Crouch v. R. R. Co.*, 14 C. B. 255; *Burritt v. Ins. Co.*, 5 Hill, 188; *People v. Ins. Co.*, 2 T. & C. 268; *Appleby v. Ins. Co.*, 54 N. Y. 253.

Thomas B. Hewitt, for respondent.

PER CURIAM. The defendant claims that the description of the house insured as a dwelling was a warranty that it was occupied as such. Unless there was evidence to show misrepresentation or

* See *Alexander v. Germania Fire Ins. Co.* (66 N. Y. 464), 23 Am. Rep. 76, and note 79.

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concealment as to the fact of occupation, there is no ground for such a position. The defendant had ample opportunity to ascertain how the fact was, and having failed to improve it by making inquiries through its agent, or to make provision in the policy for such a case, it cannot now claim that the insurance was for a building which was occupied contrary to the plain meaning and import of the language employed.

The claim that the neglect of the insured to make known the fact that the building was vacant and unoccupied was a breach of the condition is also unfounded. The provision in the policy that any omission to make known any fact material to the risk should render it void, in the absence of proof of fraud, is not violated because the insured fails to disclose facts in regard to which no inquiry is made. The applicant has a right to suppose that the insurer, in making inquiries as to particular facts, considers all others to be immaterial, or that he assumes to know or waives information in regard to them. *Gates v. Madison Co. Mut. Ins. Co.*, 5 N. Y. 475. If the insurer fails to inquire as to occupation, unless there is proof of concealment, it is not evidence of bad faith which will vitiate the policy. Under such a state of facts, when no statement is made in the policy as to the occupation of the building, it must be assumed that the insurance was made without regard to occupation.

[Omitting minor points.]

The judgment should be affirmed.

All concur.

Judgment affirmed.

QUINN V. PEOPLE.

(71 N. Y. 561.)

Criminal law — burglary — "dwelling-house."

An indictment charged the breaking and entering in the night-time of a "dwelling-house of A and B, being copartners in business under the firm name and style of A & B." It was shown on the trial that A and B were partners, and in their business used and occupied as stores the lower stories of two adjacent buildings, opening into each other. A, with other persons, lived in the upper rooms, and was there at the time of the burglary, but

there was no internal communication between the stores and the upper rooms, the latter being accessible only through a fenced yard and a stair-case leading thence. The breaking was into one of the stores. *Held*, (1) that the ownership was properly charged as being in a partnership; (2) that the entry was into a "dwelling-house" within the statute of burglary, which enacts that no building shall be deemed a dwelling-house, unless joined to, immediately connected with, and part of a dwelling-house; that phraseology being intended only to exclude isolated, uninhabited out-houses.

CONVICTION of burglary. The opinion states the facts.

Max C. Huebner, for plaintiff in error. The occupation of a house by others than the owner, his family, or his domestic servants, does not constitute it the owner's dwelling-house. *Harris' Case*, 2 Leach, 701; *Davies alias Silks' Case*, id. 876; *Rex v. Martin*, R. & R. 108; *Rex v. Flanagan*, id. 187; *Lyons' Case*, id. 255; *Fuller's Case*, id. 408. There was not such an invasion of the firm's right of habitation as to constitute burglary. 3 R. S. 947; *Rex v. Margetts*, 2 Leach, 930; *Rex v. Witt*, R. & M. O. C. R. 248; *Armour v. State*, 3 Humph, 379.

John Croak, for defendants in error. The building broken into was a dwelling. *Rex v. Gibson*, 1 Leach, 357; *Robertson's Case*, 4 City Hall R. 63; Arch. Cr. Law, 166.

FOLGER, J. The plaintiff in error was indicted of the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. 2 R. S., p. 668, § 10 subd. 1. The crime, as there defined, consists in breaking into, and entering in the night-time, in the manner there specified, the dwelling-house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and entering, and the criminal intent. The questions mooted in this court are, whether it is legally proper, in an indictment for burglary of a dwelling-house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling-house, within the intent of the statute. As to the first question: The indictment averred the breaking and entering into the dwelling-house of Frederick Kohnsen and John F. Lubkin, being copartners in business under the firm-name and style of

Kohnsen & Lubkin. The authorities are numerous enough and clear, that the ownership of the dwelling-house may be laid in the indictment to be in the members of a copartnership, when the facts of the case warrant it. In *Rex v. Athea*, R. & M. C. C. 329, the indictment averred the stealing in the dwelling-house of Halling and others. It appeared that Halling, Pierce & Stone carried on business on the premises in which the offense was committed. Pierce lived in the house, which was the joint property of the firm. The other partners resided elsewhere. It was held upon a case reserved, that the dwelling-house was properly laid as that of all the partners. See, also, *Rex v. Stockton & Edwards*, 2 Taunt. 339; 2 Leach, 1015; s. c., *sub nom. Rex v. Stock et al.*, Russ. & Ry. 185; *Rex v. Hawkins*, Foster's Cr. Law, 38; *Rex v. Jenkins*, Russ. & Ry. 244; *Saxton's Case*, 2 Harr. 533.

The facts of the case in hand are meagerly presented upon the error-book, but we gather from it, and from the concessions made upon the points and on the oral argument, that Kohnsen & Lubkin, the persons named in the indictment, were copartners in trade; and, as such, held and occupied the buildings, into one room of which the burglarious entry was made; that the lower or first stories of the buildings were used for the purposes of their business, and opened into each other; that in the upper rooms one only of the partners and some other persons lived, and were present on the night of the burglary. This state of facts is in accord with those presented in the cases above cited. We are of opinion that the first question presented must be resolved against the plaintiff in error. The ownership of the buildings was properly laid by the indictment in Kohnsen & Lubkin. The ownership remained with them; the actual possession of the portions of the buildings used for business was in them, and the possession of part of the portion of the buildings used to live in was in them, by the actual possession and occupation of that part by Kohnsen. They had not given such an interest to other persons in the whole or in parts of the buildings as to constitute an ownership in such other persons. 2 East's P. C. C. 15, § 18, p. 502. The cases are somewhat in conflict upon this point, it is true, and are not easily reconciled or distinguished. See *Rex v. Margetts et al.*, 2 Leach, 930; but it is plain that here the partners, as such, had the ultimate control and right of possession of the whole buildings, and the actual possession of the

shop entered, and of the sleeping-room above it, thus bringing the case within several decisions.

As to the second question: In addition to the facts already stated, it is needed only to note that there was an internal communication between the two stores, in the two lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only, but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence up stairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is, that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling-rooms, there was not a breaking into a dwelling-house, and hence the act was not burglary in the first degree as defined by the Revised Statutes as cited above. In considering this point, I will first say that the definition of the crime of burglary in the first degree, given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same." *

* * 2 Russ. on Cr., p. 1, § *785. It will, therefore, throw light upon this question to ascertain what buildings or rooms were at common law held to be dwelling-houses, or a part thereof, so as to be the subject of burglary. For, so far as the Revised Statutes as already cited are concerned, what was a dwelling-house or a part thereof at common law must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same inclosure, and were built close to and adjoining each other. *Case of Gibson, Mutton & Wiggs*, Leach's Cr. Cas. 357 (case 174), recognized in *The People v. Parker*, 4 Johns. 423. In the case from Leach, there was a shop built close to a dwelling-house in which the prosecutor resided. There was no internal communication

between them. No person slept in the shop. The only door to it was in the court-yard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling-house of the prosecutor, and the case was reserved for the consideration of the twelve judges. They were all of the opinion that the shop was to be considered a part of the dwelling-house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling-house. The case in Johnson's Reports, *supra*, is also significant, from the facts relied upon there to distinguish it from the case in Leach, *supra*. Those facts were that the shop entered, in which no one slept, though on the same lot with the dwelling-house, was twenty feet from it, not inclosed by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both so as to bring them within one inclosure, therefore, the case was within that of *The King v. Garland*, 1 Leach's Cr. Cas. 130 (or 171), case 77. It has been urged in the consideration of the case in hand, that though the common law did go further than the cases above cited, and did deem all out-houses, when they were within the same inclosure as the dwelling-house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose, and were thus essential or convenient for the enjoyment of the dwelling-house as such. *Gibson's Case*, *supra*, would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling-house. The books have many cases to the same end; *Rex v. Gibbons & Kew*, Russ. & Ry. 442, the case of a shop; *Robertson's Case*, 4 City Hall Rec. 63, also a shop with no internal communication with the dwelling-house; *Rex v. Stock et al.*, Russ. & Ry. 185, a counting-room of bankers; *Ex parte Vincent*, 26 Ala. 145, one room in a house used as a wareroom for goods; *Rex v. Witt*, 1 M. C. C. 248, an office for business, below lodging-rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation.

It is plain that both of these may arise, when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings; *Rex v. Jenkins*, Russ. & Ry. 244; *Rex v. Westwood*, id. 495; where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes. It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the plaintiff in error. *State v. Langford*, 1 Dev. 253; *State v. Jenkins*, 5 Jones, 430; *State v. Bryant Ginns*, 1 Nott & McCord, 583. Though in the case last cited, it is conceded that if a store is entered, which is a part of a dwelling-house, by being under the same roof the crime is committed; and it must be so, if it is the circumstance of midnight terror in breaking open a dwelling-house, which is a chief ingredient of the crime of burglary; and it is for that reason that barns and other out-houses, if in proximity to the mansion-house, are deemed *quasi* dwelling-houses, and entitled to the same protection. *State v. Brooks*, 4 Conn. 446-449. Coke 3 Inst. 64, is cited to show that only those buildings or places, which in their nature and recognized use are intended for the domestic comfort and convenience of the owner, may be the subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth converse" — i. e., be employed or engaged with; Richardson's Dic., *in voce*; "being a parcell of a mansion-house, or not parcell, is taken for a mansion-house." So Hale is cited, 1 P. C. 558; and it is there said that, "to this day it is holden no burglary to break open *such a shop*." But what does he mean by that phrase? That appears from the authority which he cites (Hutton's Reps. 33); where it was held no burglary to break and enter a shop, held by one as a tenant in the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling-house. But Hale also, 1 P. C. 557, cites as law the passage from The Institutes above quoted. Other citations from text-books are made by the plaintiff in error; they will be found to the

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same effect, and subject to the same distinction as those from Coke & Hale. And see *Rex v. Gibbons et al.*, *supra*; *Rex v. Richard Carroll*, 1 Leach's Cr. Cas. 237, case 118. That there must be a dwelling-house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error, of *Rex v. Harris*, 2 Leach, 701; *Rex v. Davies alias Silk*, id. 876, and the like. There were cases which went further than any thing I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling-house, but held the crime committed, if the building entered was within the same fence or inclosure as the building slept in. And the dwelling-house in which burglary might be committed was held formerly to include out-houses—such as ware-houses, barns, stables, cow-houses, dairy-houses—though not under the same roof or adjoining contiguous to the house, provided they were parcel thereof. 1 Russ. on Cr. *799, and authorities cited. Any out-house within the curtilage, or same common fence with the dwelling-house itself, was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or home-stall. *State v. Twitty*, 1 Hayw. (N. C.) 102; *State v. Wilson*, id. 242. See, also, *State v. Ginns*, 1 Nott & McCord, 585, *supra*, where this is conceded to be the common law. See note *a* to *Garland's Case*, *supra*.

It seems clear, that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling-house.

The rules of the common law as to this crime have been affected by statutory provision in this State. At common law there were no degrees of burglary. The breaking into a dwelling-house in the night, with felonious intent, made the crime, and any building within the curtilage was deemed a dwelling-house. But the revisers thought that the offense partook of different degrees of criminality, and sought to class them according to their atrocity. They saw that when the breaking was into a building in which some one was at the time sleeping, there was, by the act, a liability to create alarm, to provoke resistance and an affray, and to endanger human life; *Reg. v. Higgs*, 2 Carr. & Kirwan, 322; and that there was greater recklessness and depravity in the offender. 5 Edmonds' Stat., p. 544. So they made that act burglary in the

first degree, and affixed to it the severest statutory penalty, of not less than ten years' imprisonment in the State prison. 2 R. S., pp. 668, 669. And mindful of the extent to which the courts had gone, as is herein above shown, in holding an outer building a dwelling-house, they defined that word for the purposes of the burglary act as follows: "Section 16. No building shall be deemed a dwelling-house, or any part of a dwelling-house, within the meaning of the foregoing provisions, unless the same be joined to, immediately connected with, and part of a dwelling-house." 2 R. S., p. 669, § 16. From this it is contended that a shop or store, like that entered in this case, having no internal communication with the parts of a building used for the purpose of a dwelling-house, is not within the burglary act a dwelling-house, or a part of one. But it is plain, that in reporting this sixteenth section, the idea in the minds of the revisers was to exclude from the grade of burglary in the first degree, and from its severity of punishment, a felonious breaking into any building so removed or detached from a dwelling-house in which was some person, as that there would be no likelihood of endangering human life by the act; yet to keep within that grade any building so joined to, immediately connected with and a part of a dwelling-house, as that by the felonious act that likelihood would arise; and this must be kept in mind in construing that sixteenth section. There is another thing to be noticed. The word they used in the sixteenth section is "*building*." "No *building* shall be deemed a dwelling-house, * * * unless," etc. Evidently they meant a structure which of itself was a building, so as to stand and subsist, separate and independent from the other structure, which is the dwelling-house of the owner. They meant to exclude inhabited out-houses, isolated from the inhabited dwelling-house and forming no part thereof, and having no junction or connection therewith. They have given us a key to the meaning of the word "*building*" as thus used by them. In their note upon this sixteenth section, 5 Edmonds' Stat. 545, they refer to the Arson Act for a provision to the same purport. 2 R. S., p. 661, § 10. This is their language: "The same description is in arson of the first degree," section 11, title 1. Turning to that section eleven, which, as enacted, became section ten, just above cited, we find it thus: "But no barn, shed, or other out-house shall be deemed a dwelling-house, or part of a dwelling-house, within the meaning of the last

section, unless the same be joined to, immediately connected with, and part of a dwelling-house." It is plain that the word "building" in the sixteenth section (in the Burglary Act) means any barn, shed, or other out-house, and it is proper, in construing that section, to substitute those words for that word; when that is done, it is also plain that the sixteenth section has no application to a room in a building used as a dwelling, within the same outer walls, beneath the same roof. The Arson Act has such a likeness to the Burglary Act that a decision upon a like point under the former act will be applicable to the case in hand. In *The People v. Orcutt*, 1 Park. 252, the Oneida Oyer and Terminer charged the jury, "that it was not necessary that the whole building should be occupied usually by persons lodging therein at night; if a part of it was occupied as a sleeping-room it was sufficient." In that case the building set fire to and the one used to sleep in had lofts opening into each other, but that fact is not dwelt upon by the court. And consonant with that is *Rex v. Winter*, Russ. & Ry. 295, which was the burning of a school-house, under the same roof as the dwelling-house, but practically separated therefrom by a narrow way. It was held that it was both an out-house and a part of the dwelling-house, there being two counts in the indictment which respectively so alleged. It is manifest that the revisers and the legislature meant to exclude from the grade of burglary in the first degree, and from the severity of the punishment therefor, an entry into a structure, within the same inclosure as the dwelling-house, but not so connected with it as that an entrance into the former by force would be likely to rouse one sleeping in the latter. They did not mean a room, or part of the same structure with the dwelling-house, within the same four outer walls, and beneath the same roof, though there was no internal communication between the room entered and the room of the sleeper. It is plain that a violent entry into such a room would be likely to rouse the occupant of the sleeping-room, and draw him forth to an encounter, and liability to death or injury, in defense of his goods. I do not find any adjudication in this State upon this sixteenth section. In England there are cases upon analogous statutes. There the severity of the common law has also caused enactments, 7 and 8 Geo. 4, ch. 29, § 13; 24 and 25 Vict., ch. 96, § 53, which declare, in substance, that the building entered must be a part of the dwelling-house, and that it is not to be so deemed unless there

shall be a communication between such building and the dwelling-house, either immediate, or by means of a covered and inclosed passage leading from one to the other. It will be observed that these statutes are much more particular in requiring a communication than is section sixteen of the Revised Statutes above quoted. *Rex v. Burrowes* (1830), 1 Mood. (C. C.) 274, is one adjudication construing this provision, where the prisoner on an indictment for burglariously entering a dwelling, was proved to have entered a wash-house which had no internal communication with any part of the dwelling-house, as the door of the wash-house opened into a back yard. But it was under the same roof. It was held by seven judges against five that the wash-house was a part of the dwelling-house. In *Somerville's Case* (1834), 2 Lew. 113; *Rex v. Higgs, supra* (1846); *Rex v. Turner* (1834), 6 Carr. & C. 407; *Rex v. Westwood* (1822), Russ. & Ry. 495; *Eggington's Case*, 2 East's P. C. 494, it was held that the building entered was not a dwelling-house, or a part of one; but in each of these cases it is mentioned as one of the facts, which led to that conclusion, that the building or room entered was not under the same roof with the building or room occupied for sleeping in. I find no decision, that where the room or building entered was under the same roof, and within the same four walls, it was not held to be a part of the dwelling-house within the statutory or common-law definition of burglary.

From this discussion it appears that the act of the plaintiff in error, in breaking into the store in the night-time with felonious intent, a part as it was of a whole building in other parts of which there were persons dwelling and sleeping at the time, though there was no internal communication between the store and their rooms, was an act of recklessness and depravity, likely to cause alarm and to lead to personal violence and so endanger human life. It also appears that the revisers and the legislature, in the defining and restrictive section quoted (§ 16 of the Burglary Act), did not mean to say that one room in a whole building, within the same outer walls and under the same roof as the whole building, must be also connected with the rest of the building by an internal, inclosed or covered communication, to make it a part of that building, and to make it a part of a dwelling-house within the definition of burglary in the first degree given by them, if any part of the building was occupied for the purposes of a dwelling-house.

I am brought to the conclusion that upon the facts proven, the

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plaintiff in error was properly indicted and convicted of the statutory crime of burglary in the first degree.

The judgment brought up for review should be affirmed.

It may ward off misapprehension, if it is said that if different stores in a large building, some parts of which are used for sleeping apartments, are rented to different persons for purposes of trade or commerce, or mechanical pursuit, or manufacturing, another rule comes in. For illustration, let there be mentioned the Astor House in New York city. The rule is, that a part of a dwelling-house may be so severed from the rest of it, by being let to a tenant, as to be no longer a place in which burglary in the first degree can be committed, if there be no internal communication, and the tenant does not sleep in it. Then it is not parcel of the dwelling-house of the owner, for he has no occupation or possession of it; nor is it a dwelling-house of the tenant, for he does not lodge there. 1 Hale's P. C. 557, 558; Kel. 83, 84; 4 Black. Com. 225, 226; East's P. C. C. 15, § 20, p. 507.

ALLEN, MILLER and EARL, JJ., concur; RAPALLO and ANDREWS, JJ., dissent; CHURCH, C. J., not voting.

Judgment affirmed.

CASES
IN THE
SUPREME COURT,
OF
KANSAS.

THE STATE V. SAUNDERS.

(19 Kans. 197.)

Constitutional law — inter-state commerce.

A statute prohibiting the transportation from one State to another of prairie-chickens, which have been lawfully killed, is void as in contravention of the provision of the Federal Constitution, granting to Congress the power to regulate commerce among the several States.*

CRIMINAL information. The opinion states the facts. **The** defendant was convicted and sentenced, and appealed.

A. A. Harris and W. H. Spencer, for appellant.

D. M. McKenney, county attorney, for the State.

VALENTINE, J. This was a criminal prosecution for an alleged violation of section 6 of the act of the legislature of the State of Kansas of 1876, entitled, "An act for the protection of birds." (Laws of 1876, pp. 183, 184.) It seems that the defendant, as the agent of the Adams Express Company, on the 8th of November, 1876, shipped by said express company from Columbus, Cherokee county, Kansas, to Chicago, Illinois, four prairie chickens, which

* See *Pheips v. Racey* (60 N. Y. 10), 19 Am. Rep. 140.

prairie chickens had previously and recently been killed as game. Said prairie chickens were not caught or killed in violation of any law, but were caught and killed at a time and in a manner allowed by law. The provision of said act which it is claimed that the defendant violated read as follows :

"SECTION 6. It shall be unlawful for any person, railroad corporation or express company, or any common carrier, knowingly to transport or to ship, or to receive for the purpose of transporting or shipping, any of the animals, wild fowls, or birds mentioned in this act, *in or out of the State of Kansas* ; * * * and any agent of any such person, corporation, or company, who shall knowingly violate the provisions of this section by receiving or shipping any such game as the agent of such person, corporation, or company, shall, on conviction thereof, be fined in a sum not less than ten nor more than fifty dollars ; * * * *provided*, that such penalty shall not apply to the transportation of such birds and animals in transit through this State from other States and Territories."

The defendant claims that said act is unconstitutional and void so far as it has any application to this case ; *first*, because it is in violation of that clause of section 16 of article 2 of the Constitution of Kansas, which declares that "no bill shall contain more than one subject, which shall be clearly expressed in its title ;" *second*, because it is in violation of that provision of section 8 of article 1 of the Constitution of the United States, which declares that "the Congress shall have power * * * to regulate commerce * * * among the several States."

I. Of course, said act of the legislature is unconstitutional and void so far as it relates to any *animal* except "birds ;" and how the inhibition against the transportation of living birds would promote "the protection of birds," is not altogether clear. The birds transported in this case were however dead ; and it is supposed by the prosecution that the prevention of the shipping or transportation of dead birds would in some manner "protect birds," and therefore that the act, so far as it prohibits the shipping of dead birds (although the birds are lawfully taken and killed), is constitutional and valid. We shall not decide this question, however, but shall pass to the next question.

II. Section 8 of article 1 of the Federal Constitution provides among other things that, "the Congress shall have power * * * to regulate commerce with foreign nations, among the several

States, and with the Indian tribes." Ever since the adoption of this provision, the judges of the Supreme Court of the United States seem to have been groping their way cautiously, but darkly, in endeavoring to ascertain its exact meaning, and the full scope of its operation. They have many times construed it, but as yet have hardly fixed its boundaries, or its limitations. They have no doubt generally construed it correctly, but some of their decisions with reference thereto seem to be conflicting and contradictory, and scarcely one of such decisions has been made without a dissenting opinion from one or more of the judges. We think, however, that amidst all their conflicts and wanderings they have finally settled, among other things, that no State can pass a law (whether Congress has already acted upon the subject or not), which will directly interfere with the free transportation, from one State to another, or through a State, of any thing which is or may be subject of inter-State commerce. Case of *The State Freight Tax*, 15 Wall. 232, and cases there cited. See, also, in this connection, *Welton v. The State of Missouri*, 91 U. S. 275; *Henderson v. Mayor of New York*, 92 id. 259; *Chy Lung v. Freeman*, id. 275; *Ward v. Maryland*, 12 Wall. 418. This view of the law does not prevent a State from passing proper sanitary laws, or any proper law for the protection or preservation of life, liberty, health, or property. Nor does it in any case prevent a State (in the absence of congressional legislation upon the subject), from passing laws for any proper purpose where such laws only indirectly and remotely interfere with inter-State commerce. *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Sherlock v. Alling*, 93 U. S. 99. See, also, in connection with this and the foregoing propositions, the following Texas-Cattle cases, to wit: *Chicago & Alton Railroad Co. v. Gasaway*, 71 Ill. 570; *Sangamon Distilling Co. v. Young*, 77 id. 197; *Wilson v. Kansas City, St. Joseph & C. B. Railroad Co.*, 60 Mo. 184; *K. P. Railway Co. v. McCoy*, 8 Kans. 538. For instance, a law which prohibits the catching and killing of prairie chickens, may be valid, although it may indirectly prevent the transportation of such chickens from the State to any other State; but a law which allows prairie chickens to be caught and killed, and thereby to become the subject of traffic and commerce, and at the same time directly prohibits their transportation from the State to any other State, is unconstitutional and void. The Federal Constitution seems to give to Congress the absolute and unqualified

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power to regulate inter-State commerce; and it has frequently been said that this power is exclusive; and it is certainly exclusive within the limits hereinbefore mentioned. In the case of *Wellton v. The State of Missouri*, 91 U. S. 275, 282 it is said, that "the fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled." But qualifying this language to some extent, it is said, in the case of *Sherlock v. Alling*, 93 U. S. 90, 104, that "it may be said generally, that the legislation of a State, not directly against commerce, or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-State, or in any other pursuit." We think that said section 6, so far as it has any application to this case, is unconstitutional and void.

The judgment of the court below will therefore be reversed, and cause remanded for further proceedings.

All the justices concurring.

Judgment reversed.

COMMISSIONERS OF OTTAWA CO. V. NELSON.

(19 Kan. 284.)

Constitutional law — uniformity of taxation.

Under a constitutional provision that the rate of taxation shall be uniform and equal, the legislature may, in dividing a county or township, relieve the personal property of the detached territory from all liability for previous debts of the county or township, while continuing the liability of all the other property.

ACTION for injunction. The plaintiffs stated that they were several owners of real estate in the township of Bennington, that this township was formerly part of the township of Concord; but had been duly detached and set off and organized into a sepa-

rate township called Bennington ; that previously the authorities of Concord had duly issued the bonds of the town in payment for the construction of bridges in Concord, but not within the territory of Bennington ; that taxes had been levied on the plaintiffs' said real estate to pay interest on and provide a sinking fund for the payment of those bonds, and that the said real estate had been sold for such taxes ; that said taxes were levied only on real estate in Bennington, although there were a large amount of personal property there subject to taxation ; and demanded judgment declaring said taxes void and cancelled, and that defendants be enjoined from enforcing them. Defendants demurred on the ground that no cause of action was stated. The demurrer was overruled and plaintiffs had judgment, and defendants brought error.

Thompson & Johnston, for plaintiffs in error.

McClure & Humphrey, for defendants in error.

VALENTINE, J. In 1872 the township of Concord, Ottawa county, was duly divided, and from the detached territory the new township of Bennington was constituted. At the time of said division the township of Concord was liable on an indebtedness for certain bonds previously issued by the township to build certain bridges. The question now presented is, whether Bennington township is liable to pay any portion of said indebtedness. Or rather, it is, whether the real estate situated in said township is thus liable. Or, to state the legal question involved in the case with more exactness, it is, whether sections 3 and 4 of "an act to regulate taxation on the change of boundary lines," approved March 3, 1873 (Laws of 1873, page 267), are constitutional and valid, or not. For if said sections are constitutional and valid, then the real estate in said township of Bennington is liable for a portion of said indebtedness ; but if they are not constitutional and valid, then no portion of the property in Bennington township is thus liable. This same question, with some others, has already been decided by this court. *Comm'rs of Sedgwick County v. Bunker*, 16 Kans. 498. In the Sedgwick county case we held that said sections were constitutional and valid, and we still think that such decision is correct. We were not however at that time entirely satisfied with that decision, and we are not now entirely satisfied with the same ; but it corresponded then with our best

judgment, and it corresponds now with our best judgment. Counsel for defendant in error in this case ask us to reconsider that decision, and they present to us a very able and elaborate argument to convince us that we were wrong. But they have presented nothing new—nothing that we had not already carefully considered and held to be insufficient to invalidate the law. But it is not strange that counsel should wish to have the question re-examined and reconsidered. The question is a difficult one. The arguments on both sides are nearly equally balanced, and different minds might honestly come to different conclusions thereon. Even unprejudiced minds might reach different conclusions, while every prejudiced mind will undoubtedly reach a conclusion corresponding with its own prejudices, or its own interests. Every person whose interest is against the law will undoubtedly believe that the law is unconstitutional. But this is not all. The arguments against the constitutionality of the law lie principally upon the surface, and can easily be seen and comprehended, while the arguments in its favor lie further back and can only be seen or comprehended by greater labor and by severer mental effort. To say that all assessments and all taxes must be equal and uniform in order to be valid ; that the tax in this case is not equal and uniform, and therefore that the tax in this case is void, is an argument so short, so simple, so logical, and so easy of comprehension, that all persons who cannot or will not push their inquiries into a broader field of investigation will gladly accept it as true, and think it conclusive. But this argument is not sound. The fault is in the major premise of the syllogism. All assessments and all taxes are not required to be equal and uniform. It is true, that a certain degree of equality and uniformity must prevail in all assessments, and in all taxes, or they will be void. But the broad proposition, that all assessments and all taxes must in all respects be equal and uniform, is not true, and in the nature of things it could scarcely in any case be made to be true. Counsel for defendant in error, all through their argument, seem to have mistaken the language of our Constitution. Our Constitution provides that “the legislature shall provide for a uniform and equal *rate* of assessment and taxation.” Const. of Kans, art. 11, § 1. It does not provide for a uniform or equal *rule* of assessment or taxation. And yet counsel all through their argument continually speak of the “uniformity of the *rule* of assessment and taxation,” instead of speaking in the

language of the Constitution of "a uniform and equal *rate of assessment and taxation.*" They use the language of the Constitutions of Ohio, and Wisconsin, and California, and several other States, instead of using the language of our own Constitution. Now why should they do this, if they really believe that the language of our own Constitution is sufficient for their purpose? Neither does our Constitution in terms require that *all property*, except such as it itself exempts, shall be assessed or taxed; nor does it provide in terms that no exemption shall be allowed except such as it allows. On the contrary, it provides in terms that "*personal property to the amount of at least two hundred dollars for each family, shall be exempt from taxation,*" and by this language unavoidably implies that more than two hundred dollars' worth of personal property may be exempted by statute. In this particular, as well as in the said "*rate of taxation,*" our Constitution differs from those of many of the other States. These differences will be noted in the opinion soon to be delivered in the case of *Francis, State Treas'r, v. A. T. & S. F. Railroad Co.* The full provision of our Constitution upon these subjects reads as follows:

"The legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for State, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, and personal property, to the amount of at least two hundred dollars for each family, shall be exempted from taxation." Const., art. 11, § 1.

Counsel for defendant in error refer us to the *rule* of taxation as enunciated in the case in 9 Wis. 440. Now on that page is found the brief of counsel for the plaintiff, in the case of *Milwaukee, etc., R. R. Co. v. The County of Waukesha*. Said counsel in that case was opposed to the law, and of course said it was invalid. The court however held it to be valid and constitutional. In the opinion the court say: "The imposition upon railroad property, by the act of 1854, does not violate that provision of the Constitution of Wisconsin which provides a uniform rule of taxation, provided like property pertaining to railroads, or all property of that class, is alike taxed, or *alike exempt*, as it appears to be." 9 Wis. 449. This case is reported in a note to the case of *Knowlton v. Supervisors of Rock Co.*, 9 Wis. 410. The court does not, in either of these cases, decide that property other than that exempted by the Constitution may not also be exempted from tax-

ation by statute. In the first case mentioned, the court decides as above stated; and in the other case, the court decides that a part of the property in any given district cannot be taxed "by a different rule from that by which other property (in the same district) is taxed," but that "all kinds of property must be taxed uniformly, or be absolutely exempt." Syllabus, page 411. See, also, in this connection, *Ill. Cent. R. R. Co. v. McLean Co.*, 17 Ill. 291.

Now, in the present case, the real estate of said Bennington township is all "taxed uniformly" to pay said indebtedness, and the personal property is all "absolutely exempt" from such taxation. Is not this in accordance with the said Wisconsin decisions? We are also referred to a decision in California. But in California the Constitution requires that "*all property* in the State shall be taxed in proportion to its value," and "*taxation* shall be equal and uniform." We are also referred to decisions in Indiana. Now if we understand the following decisions in Indiana, property may be exempted from taxation by statute which is not so exempted by the Constitution: *Bank v. City of New Albany*, 11 Ind. 139, 142; *Connersville v. Bank*, 16 id. 105; *King v. Madison*, 17 id. 48. We do not take issue with any decision in any State referred to by counsel for plaintiffs below; and so far as the present case is concerned we might well admit that each of such decisions would be held to be good law in Kansas, even under our Constitution. The case before us is outside of all ordinary cases, and is simply analogous to the said Sedgwick county case reported in 16 Kans. 498.

As we have before stated, it is not necessary that all assessments and all taxes in Kansas should be equal and uniform in order to be valid. See *Glasgow v. Rowse*, 43 Mo. 480, and *Ill. Cent. R. Co. v. McLean Co.*, 17 Ill. 291 *et seq.* And we suppose that no person who has been able to give the subject any careful consideration will so contend. *First*: The aggregate amount and rate of assessment and the aggregate amount and rate of taxation vary in almost every county, city, town, township and school district in this State. The aggregate rate in some places is as high as five per cent on the valuation of property, and in other places it is as low as one or two per cent. And yet the Constitution says that "the legislature shall provide for a uniform and equal rate of assessment and taxation." Now does this mean "a uniform and equal rate of assessment and taxation" *throughout the State*, and

for every part and portion of the State? And if not, why not? Can any one give any sufficient reason why not? Of course every one knows that the Constitution does not mean (although it may seem to say so) that the "rate of assessment and taxation" shall be so "uniform and equal" throughout the State that if the aggregate rate of taxation in any one school district or township in the State should be just two per cent on the valuation, that the aggregate rate of assessment and taxation in every other part and portion of the State should also be just two per cent. And yet, who can give an intelligent and logical reason why the Constitution does not mean this? There are reasons, and sufficient reasons, but they do not float upon the surface. And hence we would expect that strict constructionists and superficial reasoners would refuse to receive them, and would deny their validity, even when shown to them, unless they assent through fear of ridicule for adopting such an impracticable view of the Constitution. Upon this question, see *Bright v. McCullough*, 27 Ind. 223, 229 *et seq.* and cases there cited. We have shown one exception to the rule that all assessments and all taxes must be equal and uniform; and this one exception alone destroys the universality of the rule contended for by the defendants in error, and to this extent it weakens their argument based upon the universality of such rule. But there are several other exceptions, some of which we will mention.

It seems to be almost universally admitted that said constitutional provision, requiring that assessments and taxes should be at an equal and uniform rate, does not apply to such special assessments or special taxes (usually called "special taxes" in this State) as are imposed upon abutting lot-owners in cities, towns, or villages, for street improvements. It has always been so held in this State (*Hines v. Leavenworth City*, 3 Kans. 186, 197, and subsequent cases), and has generally been so held in other States under similar constitutional provisions. Now the special and local impositions are clearly assessments, and clearly taxes; but still it is almost universally admitted that they are not such assessments and such taxes as are contemplated by said constitutional provision. Now why are they not? Can any one tell? We do not propose in this opinion to give any answer.

Neither does said constitutional provision apply strictly to license-taxes. *Leav. City v. Booth*, 15 Kans. 628, 635; *Fretwell v. City of*

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Troy, 18 id. 271. In the case of *Leav. City v. Booth*, first referred to; it is said that —

“A proper license-tax is not a tax at all, within the meaning of the Constitution, or even in the ordinary signification of the word ‘tax.’ *City of East St. Louis v. Wehrung*, 46 Ill. 395; *Addison v. Saulnier*, 19 Cal. 83; *Carter v. Dow*, 16 Wis. 298; *State v. Herod*, 29 Iowa, 123, 125; *Mitchell v. Williams*, 27 Ind. 62. This is so even where the license-tax is much greater than the mere cost of issuing the license, and even where the surplus fund incidentally arising from the issuing of the license goes into the treasury to swell the general revenue fund. *Charity Hospital v. Stickney*, 2 La. Ann. 550; *Tenney v. Lenz*, 16 Wis. 566, 567; *Chilvers v. The People*, 11 Mich. 43; *Ash v. The People*, id. 347; *Baker v. City of Cincinnati*, 11 Ohio St. 534, 543, 544; *Johnson v. Philadelphia*, 60 Penn. St. 445, 450; *Henry v. The State*, 26 Ark. 523, 525; *Orton v. Brown*, 35 Miss. 426. And there are still other decisions, holding that the constitutional provisions with reference to taxation have no reference to the collection of license-taxes, among which are the following: *Anderson v. Kerns Draining Co.*, 14 Ind. 201; *Thomasson v. The State*, 15 id. 449, 451; *Bright v. McCullough*, 27 id. 223, 232; *The People v. Coleman*, 4 Cal. 46.”

Neither do we suppose that capitation taxes, or poll-taxes, or requirements to work on the roads, or to train in the militia, come within said constitutional provision, although evidently they are all taxes in one sense. *Sawyer v. City of Alton*, 4 Ill. 127, 130; *Town of Pleasant v. Kost*, 29 id. 490, 494.

But even those assessments and those taxes which do come within said constitutional provision are not required to be, and are not always in practice, made and levied by a “uniform rule.” Railroad property is assessed in one manner, while other property is assessed in quite a different manner; and still all these assessments are held to be valid. *Gulf R. R. Co. v. Morris*, 7 Kans. 210, 220 *et seq.* Different officers may, and sometimes do, assess different pieces of property belonging to even the same individual. Id. 227, and Gen. Stat., p. 266, § 53; p. 1033, § 38, and p. 1041, § 65. Personal property is assessed and taxed by various rules. Some of it is assessed and taxed where the owner resides, without regard to where the property is situated. Some of it is assessed and taxed where the property is situated, without regard to where the owner resides. And some of it, to wit, bank stock, is assessed

and taxed where the business of the bank is done, without regard to where the owner of the stock resides, or where the bulk of the property of the bank is situated, or where the certificates of stock are held. Laws of 1876, p. 57, § 7. And it has been held in this State that in certain cases the *entire* partnership property of a firm may be taxed in one county, while some of the partners may reside in other counties. *Swallow v. Thomas*, 15 Kans. 66. All this we think is generally considered legal under our Constitution. Taxes are levied by various officers. State taxes are usually levied by special act of the legislature, and other taxes are usually levied by local officers under general laws. But the same local officers for any taxing district do not always levy all the taxes for such taxing district. Take cities of the second class, for instance; and in such cities some of the taxes are levied by the mayor and council; Laws of 1873, p. 128, § 32; some of them are levied by the board of education; Laws of 1876, p. 272, § 18; and still another portion of such taxes may be levied by the county clerk of the county in which such city is situated; Laws of 1875, p. 45, § 6. The most of the school district taxes are levied by the school districts themselves, but some of such taxes may be levied by the county commissioners. Laws of 1876, p. 278, § 11. These are only examples. Other taxes are levied by still other persons. Now with all these examples and illustrations before us, how can it be said that all assessments and all taxation are governed by a "uniform rule?"

We need not multiply illustrations. The fact is, that the Constitution only requires that all ordinary and usual assessments and taxation shall be imposed at a "uniform and equal *rate*;" and all extraordinary and uncommon kinds of assessment and taxation are left to be regulated by law in the same manner as the same would be regulated if said constitutional provision did not exist. Now to tax the property of one township to pay the debt of another township, is an extraordinary and uncommon kind of taxation. It can only happen by the change of the boundary lines of one or more townships. It can perhaps never happen more than once to the same locality. And it can seldom happen even once to any one locality. Constitutions are not generally framed to meet extraordinary and exceptional cases, but only to prescribe general rules for ordinary cases. Our Constitution provides that "all county officers shall hold their offices for the term of two years, and until their successors shall be qualified." (Const., art.

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9, § 3); and yet this court held that when a new county is organized that the first county officers may be elected for a less term than two years; that the Constitution "applies only to the regular term of the office, and not to vacancies, or exceptional cases." *Hagerty v. Arnold*, 13 Kans. 367. In the organization of new counties and new townships some things must be done which in the very nature of things cannot come under any of the general rules established for older counties and older townships. And in such cases it is hardly fair to say that the framers of the Constitution intended that all of the particular provisions of the Constitution for older counties, or older townships, should apply with all their force and rigor to the new counties and new townships, as first organized, and thereby prevent the legislature from doing justice in the particular case. It is more reasonable to suppose that in such cases such provisions were intended to apply to such extraordinary and exceptional cases only so far as in the nature of things they could reasonably be made to apply.

In the case of *Comm'rs of Sedgwick Co. v. Bunker*, 16 Kans. 504, the following language is used: "When a debt is created against a county, all the taxable property therein, real and personal, becomes liable to pay the same. The real estate becomes permanently liable (except for subsequent legislation), because the owner thereof cannot remove it out of the county; but the personal property does not become so liable, for personal property may be removed out of the county at any time at the pleasure of the owner. If the legislature should change the boundary lines of any county, and in doing so should set off a strip of the territory thereof to some other county, then the legislature might at the same time enact that such strip should continue to be liable for the payment of its share of the debts of the county to which it formerly belonged, or the legislature might entirely relieve such strip from all such liability. And it would seem that the legislature ought to have the power to relieve such strip from a portion of such liability, and to continue its responsibility for the other portion. At least, it would seem that the legislature should have the power to say that the real estate shall continue liable, and the personal property not. It would hardly seem that the detached territory should complain because of such an arrangement, for the tax payers of the strip would have no more taxes to pay on their real estate in proportion to its value than the tax payers of the county from

which the strip was taken would have to pay on their real estate, and they would have nothing to pay on their personal property. They would have the advantage of the tax payers of the county in not having any personal-property tax to pay. Not taxing the personal property of the strip, however, makes the tax on all the other property both of the county from which the strip is taken, and the strip itself, higher than it otherwise would be. But as such a thing would not make the tax void as to the tax payers of the county, could it make it void as to the tax payers of the strip?" 16 Kans. 504, 505. The legislature in such a case treats the real estate of the strip, for the purpose of paying the existing bonded indebtedness of the county, as though the strip still remained a part of the county. But it treats the personal property as though it were removed from such county. That is, for the purpose of paying said bonded indebtedness the real estate of the strip is treated as remaining with the county, and is treated as though it and the county together still formed one taxing district; and by so treating the same, the *rate* of assessment and taxation for such indebtedness is equal and uniform within such taxing district. But the personal property of the strip is treated as having been removed from the county, and as having been placed in another county, and another taxing district; and by so treating the same, the *rate* of assessment and taxation in this other taxing district is also equal and uniform. Now the legislature has the power in other cases, to change the *situs* of personal property for the purposes of taxation, although no change is made in its actual *situs*. In the case of *Swallow v. Thomas*, 15 Kans. 68, it was said by this court that as to "the power of the legislature to separate, for the purposes of taxation, the *situs* of personal property from the domicile of its owner, there can be no doubt; *Tappan v. National Bank*, 19 Wall. 490; nor any of the fact that, unless it has so separated it, it is taxable at his domicile." See, also, *First National Bank v. Smith*, 65 Ill. 44. In the case of *Griffith v. Carter*, 8 Kans. 565, it was held that a stock of goods kept for sale in Coffey county, and which perhaps had never been in Douglas county, was nevertheless taxable in Douglas county where the owner of the property resided, and was "exempt from taxation in Coffey county." That is, the *situs* of the property for the purposes of taxation was in Douglas county, although the actual *situs* of the property may never have been there, and was exclusively in Coffey county. That same kind of

property would now under the same circumstances be taxed in Coffey county. The legislature has changed the law in this respect. Laws of 1876, page 57, § 7. And the legislature in making such change has not only changed the taxable *situs* of such property from Douglas to Coffey county and the *rule* of taxation in this respect, but it has also to some extent changed the *rate* of taxation; for a little higher rate of taxation must now be imposed in Douglas county, and a little lower rate in Coffey county, to raise the same amount of tax in each of the said counties than would have been necessary to impose if the taxable *situs* of said property had not been changed. And yet, such a change, and such a state of things, are legal, according to the decision made in the case of *Swallow v. Thomas, supra*. That is, according to the decisions made in said cases of *Griffith v. Carter*, and *Swallow v. Thomas*, the legislature may tax or exempt certain property in Douglas county, as it chooses, and may exempt or tax the same property in Coffey county, as it chooses, provided the property is taxed only in one county and exempted only in one county. And according to said cases, the rate of taxation would be equally equal and uniform under said constitutional provision, whether the property was taxed or exempted in either of said counties, provided, of course, that it was taxed in one and exempted in the other. It is further said, in the case of *Comm'rs of Sedgwick Co. v. Bunker, supra*: "But suppose the personal property of the strip should also be taxed; then must the personal property brought on to the strip after its separation from the county be also taxed? It was not liable for any debt of the county before the separation. Perhaps if the strip had remained attached to the county it never would have been brought on to the strip, and therefore never would have been liable for any tax or debt of the county. Perhaps the detaching of the strip had a controlling influence in bringing such property onto the strip. Then should such property be taxed to pay such debt? The debt may not be due for thirty years after the detaching; and should property brought onto the strip twenty or thirty years after its separation from the county be taxed to pay an old debt of the county? These are probably questions for the legislature, and not for the courts. But even if any portion of the personal property situated on said strip should not be taxed to pay said debt, then the uniformity of taxation contended for by the defendant would be destroyed." 16 Kans. 505. Suppose that within ten or

fifteen years from this time two men should emigrate from some other State to Kansas. Neither has ever before been in Kansas, or owned property therein, but each brings with him from his former home a considerable amount of personal property. One settles with his property in said county, the other goes onto said strip. One surrenders himself with all his property to the jurisdiction of said county, receives the benefits of all the property and institutions belonging to the county, and both he and his property become liable to taxation therein. The other never enters within the limits of said county, and never owns or has any property therein. Now is there no stronger reason for taxing the one to help pay the said debt of said county, than for taxing the other? Counsel for defendants in error in this case say not; but it would seem to us otherwise. See opinion in the case of *Chandler v. Reynolds*, soon to be delivered.

But we must conclude. We have already extended this opinion to a greater length than was probably necessary; and yet we have not exhausted the subject. To enunciate a few superficial abstract propositions, and then follow them to their logical sequences, is comparatively an easy task. But to enter upon a real investigation of a difficult and complicated subject, and examine it in all its multifarious relations and countless details, requires more time, labor, and research than we have time to give to it. We have extended this opinion, however, thus far in order to show that the general abstract propositions relied upon by the defendants in error do not state correctly either the letter or the spirit of the Constitution. They are too general. They cover too much ground. They embrace within their comprehensive terms too many particulars. No provision of the Constitution can be found so comprehensive or so sweeping in its general terms. Hence, although said general propositions of the defendants in error may seem to be generally true in their application to cases, still they cannot always be true, and must in many cases be subject to exceptions and limitations. General propositions of law, however, are generally subject to exceptions and limitations, and much of the labor of courts is devoted to ascertaining and designating these exceptions and limitations. And here comes the conflict. Technical and superficial reasoners, persons whose prejudices or interests are with the general proposition, and those who cannot or will not investigate a subject in all its manifold details, will refuse to recognize the exceptions or the limitations, and will cling to the general proposition.

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We do not wish in this case to fix the boundaries of the operation of said constitutional provision. The task would be too difficult, and we could not do it if we would. Nor do we wish to decide where said provision will apply, or where it will not apply, any further than is necessary for the decision of this particular case. Indeed, all that we wish to decide is, that said constitutional provision does not apply in this case to such an extent as to render said sections 3 and 4 of said act of 1873 unconstitutional and void. No other questions are in fact determined, whatever may be said in the opinion. Whether it is within the power of the legislature to authorize the imposition of a greater rate of taxation upon any part of the property of a detached portion of any county or township to pay indebtedness contracted by such county or township prior to its division, than upon the property of the county or township itself, is not decided in this case. The only effect of this decision is, that it announces the principle that the legislature may when dividing a county or township relieve the personal property of the detached territory from all liability for previous debts of the county or township while continuing the liability of all the other property. Nothing else is decided. The judgment of the court below will be reversed, and cause remanded for further proceedings in accordance with this opinion.

All the justices concurring.

Judgment reversed.

THE STATE v. LEWIS.

(19 Kans. 200.)

Criminal law — duress — escape and subsequent acquittal.

The mere fact that a prisoner brought before the examining magistrate remains handcuffed during the proceedings, and in that condition waives a preliminary examination, will not support a plea in abatement to the information of the offense. (*See note, p. 116.*)

Where one, being imprisoned and awaiting trial on a criminal charge, escapes, and being re-arrested is tried and acquitted of such charge, he cannot maintain such acquittal in bar of an information for such escape, under a statute providing for the punishment of any person escaping "before conviction."

INFORMATION for escape. The opinion states the facts. The defendant was convicted and sentenced, and appealed.

Smith & Solomon, and W. D. Gilbert, for appellant.

VALENTINE, J. This was a criminal prosecution for an alleged violation of section 183 of the act relating to crimes and punishments. Gen. Stat. 357. Said section reads as follows:

"§ 183. If any person, lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute, shall break such prison or custody and escape therefrom, he shall upon conviction be punished by confinement and hard labor for a term not exceeding two years, or in a county jail not less than six months."

The facts of the case, so far as it is necessary to state them, are as follows: The defendant was imprisoned in the county jail of Atchison county, in the custody of the jailer of said county, upon the criminal charge of burglary in the second degree, as defined by section 68 of the act relating to crimes and punishments (Gen. Stat. 330), awaiting a trial upon such charge; and while so imprisoned as aforesaid he broke said jail and said custody, and escaped therefrom. Afterward a warrant was duly issued by a justice of the peace of said county for his arrest upon the charge of breaking said jail and custody as aforesaid. Upon such warrant he was duly arrested by the sheriff of said county and a policeman of the city of Atchison, and was handcuffed and taken before said justice for a preliminary examination, whereupon, without said handcuffs being removed, and in the presence of said sheriff and said policeman, and said justice and the county attorney of said county, he waived a preliminary examination, and was returned to said jail. Afterward he was tried upon the charge of burglary, and was acquitted. The county attorney thereupon filed an information in the District Court of said county against the defendant, duly charging him with the offense of breaking said jail and custody, and escaping, as aforesaid; upon which information the defendant was duly arraigned and pleaded successively as follows: 1st. A plea in abatement, that he was handcuffed, and in the custody of said sheriff and said policeman, when he waived said preliminary examination, and, therefore, that said waiver was a

nullity, and that, therefore, the county attorney had no power to file said information. 2d. A plea in bar, that he had been tried and acquitted on the charge of burglary, and that, therefore, he could not be tried or convicted upon the charge of breaking said jail. 3d. The general plea of "not guilty."

The county attorney demurred to the first two pleas, and the court below sustained both of the demurrers, and we think correctly. There was no pretense that any means were used with the intent that such means would cause the defendant to waive said preliminary examination; no pretense that the defendant had any cause to fear that justice would not be done him, except the mere presence of said officers, and that he was handcuffed; no pretense that any wrong was done him, except merely the receiving of said waiver while the defendant was handcuffed; and no pretense that any of these things worked any prejudice to the defendant's substantial rights on the final trial of the case in the District Court upon its merits. We cannot, therefore, reverse the judgment of the District Court rendered upon the verdict of an impartial jury, after a fair trial has been had on the merits of the case in that court, merely because the defendant waived a preliminary examination before an examining magistrate while he was handcuffed.

The defendant also claims that, as he was acquitted on the charge of burglary, therefore, that he did not commit the offense of escaping from said jail "before conviction" upon said charge of burglary. We think otherwise. His offense of escaping from said jail comes, as we think, within the letter and the spirit of the statutes prohibiting escapes. He escaped from imprisonment for an alleged burglary, and had never been convicted of such burglary. His offense, therefore, comes within the exact letter of the statute, and of that section of the statute under which he was prosecuted. He escaped "before conviction." His offense also comes within the spirit of the statute. The spirit of the statute as gathered from sections 167 to 187 of the Crimes Act (Gen. Stat. 354 to 358), is to punish for all escapes from lawful custody. Some of said sections provide for punishing for escapes made from custody in criminal cases; some for escapes made in civil cases; some, where convictions have already been had in criminal cases, and some "before conviction" in criminal cases. And taking said sections all together, and construing said section 183 as we construe it, they provide for punishing for escapes from lawful custody in all cases. If said

section 183 is to be construed as the defendant claims that it should be construed, then it would be improper in any case to try a defendant for an escape until after a trial and conviction upon the original charge; for if he should *by any means* procure an acquittal upon the original charge, or a dismissal of the case, or a *nolle prosequi* to be entered therein, then he would not have been guilty of committing any offense by making such escape. When a party is in legal custody, and commits an escape, we do not think that it depends upon some future contingency as to whether such escape is an offense or not.

As to permitting a witness' name to be indorsed on a criminal information at the time of the trial, and permitting such witness to testify in the case, see *The State v. Dickson*, 6 Kans. 209, 219.

We do not think the court below committed any substantial error in this case, and, therefore, its judgment will be affirmed.

All the justices concurring.

Judgment affirmed.

NOTE BY THE REPORTER.—"It was formerly the practice to require the prisoner to hold up his hand, the more completely to identify him as the person named in the indictment, but the ceremony, which was never essentially necessary, is now disused; and the ancient form of asking him how he will be tried is also obsolete. The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there be danger of escape; and ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no terror or uneasiness other than what proceeds from a sense of his guilt or the misfortune of his present circumstances. 2 Hawk., ch. 28, § 1. In *Loyer's Case*, 16 St. Tr. 130, a distinction is made between the time of arraignment and the time of trial, and the prisoner was obliged to stand at the bar in irons during his arraignment; but the ruling in that case is at variance with the authority of all the expositors of the common law. The Union, ch. 5, § 1 (54), says: 'It is an abuse that a person be laden with iron, or put to pain before attainted of felony.' Britton, ch. 5, fo. 14, says: 'If felons come in judgment to answer, etc., they shall be out of irons and all manner of bonds, so that their pain shall not take away any manner of reason, nor constrain them to answer but at their free will.' 3 Whart. Cr. Law, § 8154, note b.

In *State v. Kring*, 64 Mo. 591, the court said: "It seems very clear, that without some good reason, authorizing the criminal court to depart from the general practice in England and in this country, the shackles of the prisoner, when brought before the jury for trial, should be removed. We have no doubt of the power of the criminal court, at the commencement, or during the progress of a trial, to make such orders as may be necessary to secure a quiet and safe one, but the facts stated by the court in this case, as shown by the record, that the prisoner had assaulted a person in court, about three months before the term at which he was tried, would hardly authorize the court to assume that, on his trial for life, he would be guilty of similar outrages. There must be some reason, based on the conduct of the prisoner, at the time of the trial, to authorize so important a right to be forfeited. When the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers. Besides, the condition of the prisoner in shackles may, to some ex-

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sent, deprive him of the free and calm use of all his faculties." A conviction was reversed on this account.

See, also, *People v. Harrington*, 42 Cal. 165; 10 Am. Rep. 296, where the same doctrine was held, the court observing: "In my opinion, any order or action of the court, which without evident necessity imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf." The judgment was reversed on account of the prisoner's being tried in shackles, in spite of his request to be unshackled.

SMITH v. MCNAIR.

(19 Kans. 330.)

Implied warranty of genuineness of negotiable instruments.

One who sells negotiable bonds impliedly warrants their genuineness, and in case they are forged, is liable for the return of the purchase-money, without any offer to return such bonds, and although the vendee has resold the bonds at a greater price.*

ACTION to recover the purchase-price paid for forged bonds. The opinion states the facts. The plaintiff had judgment, and defendants brought error.

HORTON, C. J. The material questions in this case are, as to the liability of a vendor of forged school-district bonds to the purchaser thereof, where there is no collateral contract of warranty; and if a liability exists against the vendor, whether a return or an offer to return the counterfeit bonds by the purchaser immediately after discovering that they are worthless, is essential to the right of recovery; and lastly, where such vendee has sold the forged bonds for a sum in excess of the price paid by him, and has never taken the bonds back, or returned the money received by him to his vendee, has such second vendee or his assignee any right of action against the original vendor? The facts are as follows: William R. McNair, assignee of Jones & Howell, sued Smith & Son to recover back the consideration, with interest, which Jones & Howell had paid the Smiths for certain supposed (but really forged)

* See *Overton v. Bolton* (9 Heisk. 762), 24 Am. Rep. 367; *Hannum v. Richardson* (48 Vt. 206), 21 Am. Rep. 122.

school bonds and coupons, which the Smiths had sold and delivered to Jones & Howell. There was no express warranty by Smith & Son, and no indorsement or written guaranty by them. Jones & Howell sold the bonds to McNair for \$87.50 more than they gave for them. There was a mistake by all the parties. The sellers and the buyers supposed the bonds to be genuine, when in truth they were forged. After they were ascertainad to be worthless, Jones & Howell assigned in writing their cause of action against the Smiths to McNair. The consideration of the assignment was the liability of Jones & Howell to their vendee, which liability was more than the claim of Jones & Howell against Smith & Son. We have carefully examined the cases relied upon by the counsel for plaintiff in error in support of the proposition that when a negotiable instrument passes by mere delivery, and the instrument is sold the same as any other article, the vendee cannot recover back the purchase-money even if the instrument is forged; but in our view, the cases cited are in conflict with the great current of both English and American authorities, and in some of the cases quoted there are features which widely distinguish them from the case at bar. The rule is, that if one person applies to another to purchase an article for a particular purpose, and the person so applied to sells him the article knowing that the purchaser relies upon his complying with his request, the law implies that the article is delivered with a warranty that it is the article called for. It is too well settled to admit of discussion, that a vendor, who sells negotiable bonds or notes, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, or counterfeit; and if the negotiable instrument turns out to be forged, the seller is liable to the vendee for what he has received from him for it, with interest from the time of the receipt. The mere act of sale impliedly warrants the genuineness of the instrument. We need only refer to a few of the many cases supporting this view.

In *Jones v. Ryde*, 5 Taunt. 488, it was held, that the vendor of a forged navy bill was bound to return the money received for it; and in this case the decision was placed on the ground that where a bill was discounted as genuine, which turned out to be forged, both parties being equally innocent, having equal knowledge and equal means of knowledge, the money was recoverable back as money had and received.

In *Young v. Cole*, 3 Bing. N. C. 724, it was held, that when the plaintiff, a stock broker, was employed by the defendant to sell for him four Guatemala bonds, in April, 1836, and it was shown that in 1829 unstamped Guatemala bonds had been repudiated by the government of that State, and had ever since been not a marketable commodity on the stock exchange, and the defendant received the price on the delivery of the bonds, both parties being ignorant that a stamp was necessary, that as the bonds were valueless the defendant was bound to restore the price received. TINDAL, C. J., said: "It is not a question of warranty, but whether the defendant had not delivered something which, though resembling the article contracted to be sold, is of no value."

In the case of the *Cabot Bank v. Morton*, 4 Gray, 156, it was decided that a person who procures notes to be discounted by a bank, impliedly warrants the genuineness of the signatures of the makers and indorsers. The court say, that it is "a general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is in fact what it is described and purports to be, and that the vendor has a good title and right to it."

Again, in *Snyder v. Reno*, 38 Iowa, 329, the court held that the transfer of a note by delivery, whether the consideration be money or merchandise, impliedly warrants the genuineness of the signature of the maker. See, also, *Gurney v. Womersley*, 28 Eng. L. & Eq. 256; *Worthington v. Cowles*, 112 Mass. 30; *Aldrich v. Jackson & Butts*, 5 R. I. 218; *Terry v. Bissell*, 26 Conn. 23; *Ledwich v. McKim*, 53 N. Y. 307.

Reason also supports the authorities. Where a person buys negotiable bonds, he expects to receive genuine instruments, not false and fictitious ones. If one buys bread, he does not expect a stone; if he bargains for fish, he is not satisfied with a serpent. In this case, Jones & Howell contracted for school-district bonds, and paid for such bonds. They received worthless papers, of no value intrinsically to any one. What they bargained for, they have not received. No school-district bonds have ever been delivered to them. Common honesty requires that the money they paid out should be returned with interest.

As to the question made, that no recovery could be had without a return, or an offer to return the forged bonds, we answer, that within the principle applied in the case of the *First Nat. Bank of Sturgis v. Peck*, 8 Kans. 660, no return or offer to return was neces-

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sary to maintain the action brought by McNair. The bonds were forged, and entirely worthless to all the parties. "In such a case, the return would be a useless ceremony, which the law never requires."

The objection of plaintiff in error to the judgment, that Jones & Howell resold the bonds in excess of the price paid, is not well sustained. The implied warranty of genuineness by Smith & Son was broken the instant of the delivery of the bonds, and they at once became liable to their vendees for the amount they received. This cause of action then accrued. The plaintiffs in error were in nowise affected by such second sale, and could not plead such sale in bar of the rights of Jones & Howell against them, nor against their assignee, who stands in the shoes of Jones & Howell in this case.

The other exceptions taken on the trial were immaterial, as the answer states the assignment of the cause of action to the defendant in error by Jones & Howell, and the sale of the forged bonds to him by them; hence these matters were not in issue in the case, and no instructions or directions to the jury concerning these facts were either necessary or proper.

The judgment of the District Court is affirmed.

BEQUILLARD v. BARTLETT.

(19 Kans. 333.)

Exemptions from execution.

Under a statute exempting from execution "tools and implements" of trade or business, and "stock in trade," a lamp and show-cases with their tables and frame, of a watchmaker and jeweller, are exempt; and watches and jewelry, manufactured and in process of manufacture by him, to order or for general sale, as well as the material kept for such manufacture, are also exempt.*

ACTION to recover personal property alleged to have been converted. The opinion states the facts. The defendants had judgment on demurrer to the evidence, and the plaintiff brought error.

*See *Baker v. Willis* (123 Mass. 194), 25 Am. Rep. 61, and note, 63; *Enscoe v. Dunn* (44 Conn. 93), 25 Am. Rep. 430.

D. B. Hadley, for plaintiff.

J. B. Scroggs and *E. L. Bartlett*, for defendant.

VALENTINE, J. James V. Bequillard, plaintiff in error and plaintiff below, being involved in debt, executed a deed of assignment for the benefit of his creditors conveying to Edward L. Bartlett, defendant in error and defendant below, all his property, "excepting nevertheless from the operation of" such "conveyance all such goods, chattels, stock in trade, wearing apparel, household furniture, and all other property and things legally exempt from levy and sale on attachment or execution by laws of the State of Kansas." Bartlett immediately took possession of all the property which he supposed was transferred to him by virtue of said deed of assignment; but the plaintiff claims that he took possession of more of his (plaintiff's) property than was so transferred. Whether he did or not, is the only question in this case. The plaintiff's action was for the value of the property claimed to have been taken wrongfully by the defendant. A trial was commenced before the court below and a jury. After the plaintiff had introduced his evidence, and rested, the defendant demurred to the evidence. The court below sustained the demurrer, took the case from the jury, and then rendered judgment in favor of the defendant and against the plaintiff for costs. The plaintiff now brings the case to this court for review. He claims that by the terms of said deed of assignment he reserved to himself all goods that were exempt by law from attachment and execution, and that the goods for which he sued in this action were so exempt. Whether they were so exempt or not, was the main question to be tried; but as the case comes to us, the question is not, whether said goods were absolutely exempt or not, but it is merely whether there was sufficient evidence to show *prima facie* that any of said goods were exempt. For, in all cases upon a demurrer to the evidence, the court (District or Supreme) must presume that all the evidence demurred to, and upon which the party resisting the demurrer relies, was and is true, except in cases where evidence of a weaker kind is contradicted by evidence of a higher kind, and where the court could say as a matter of law, that the weaker evidence should not be considered at all but should be excluded. A court cannot upon a demurrer weigh conflicting evidence. This is the province of the jury. Therefore, if the evi-

dence in this case showed *prima facie* that any one of the articles claimed by the plaintiff was exempt, the court below erred in sustaining said demurrer, and its judgment would in such a case have to be reversed.

The good in controversy might be divided into three classes, as follows: first the tools and implements by which plaintiff carried on his trade or business; second, the goods which he himself manufactured to sell; third, the goods which he purchased of others to sell. All of these goods, the plaintiff claims, were exempt from attachment and execution, under the following statute, to wit:

"Every person residing in this State, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this State, the following articles of personal property: * * * *Eighth*, The necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, and, in addition thereto, stock in trade not exceeding four hundred dollars in value." Gen. Stat. 473, 474, § 3.

The evidence showed that the plaintiff resided in Wyandotte, Kansas; that he was the head of a family; that he was a watchmaker and jeweller by trade, and that he carried on the business in Wyandotte, Kansas, of making and repairing watches and jewelry, and of buying and selling watches and jewelry. This business was all carried on in one room. That is, the plaintiff made, repaired, and sold said watches and jewelry all in the same room. He kept one lamp to light this room, two show-cases in which to show and display his watches and jewelry, two tables on which to support the show-cases, and one iron frame to protect one of said show-cases. These articles were all used in the plaintiff's business, and were so used with respect to the goods manufactured by the plaintiff himself, as well as to those purchased of others. The defendant took all these articles from the plaintiff. The defendant also took thirty-seven articles of jewelry manufactured by the plaintiff himself for the purpose of sale, and kept by him for that purpose. Several of these thirty-seven articles were not fully completed when the defendant took them, but the most of them were. The defendant also took a large number of other articles of jewelry purchased by the plaintiff for sale, and kept by him for that purpose. The plaintiff claims that all of the foregoing articles, the lamp, the show-cases, the tables, the iron frame, and the jewelry, were exempt

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from attachment and execution, and therefore that they were all reserved to him by said deed of assignment, and therefore that the defendant had no right to take them. It will be noticed from the foregoing facts that the plaintiff was both a manufacturer and a merchant. As a *merchant* merely, we do not think that the plaintiff could hold any of said articles as exempt from attachment or execution. *Gupit v. McFee*, 9 Kans. 30; *Grimes v. Bryne*, 2 Minn. 90. Therefore all of said articles which the plaintiff purchased and kept for sale merely for speculation, were not exempt from attachment or execution, for he held them merely in the character of a merchant. And if said show-case, etc., were necessary to the plaintiff's business only in his character as a merchant, then we would think that they also were not exempt. If, however, they were necessary for the plaintiff's business in his character as a manufacturer, then we would think that they were exempt as "tools and implements." From the evidence in the case it would seem that the lamp at least was necessary for the plaintiff's business as a manufacturer. Possibly some of the other articles may also have been necessary to him as a manufacturer. And as it would seem from the evidence that one at least (and perhaps more) of said articles was necessary for the plaintiff's business as a manufacturer, the question of whether it was so necessary or not, should have been submitted to the jury. We also think that said thirty-seven articles of jewelry manufactured by the plaintiff himself were exempt as "stock in trade." *Stewart v. Welton*, 32 Mich. 56. Some of them were completed and some of them were not. Evidently those not completed were exempt. But we would think that the others were also exempt. The exemption laws are to be liberally construed so as to effect the humane purpose designed by the legislature in enacting them. If it were held that the raw material in the hands of a mechanic or tradesman was exempt, but that the goods manufactured out of such raw material and kept by such mechanic or tradesman for sale were not exempt, it would be to discourage such mechanic or tradesman from using his time and skill in manufacturing his raw materials into goods for the purpose of selling them. This would be a violation of the spirit of this particular provision of the exemption laws. One of the objects of the exemption laws in exempting the tools and implements of a mechanic, miner, etc., and in exempting a certain amount of his stock in trade is, to encourage him to be industrious so that he may

earn a livelihood for himself and family ; but if, when he uses his tools and implements, and such of his stock in trade as consists of raw materials, in manufacturing goods, these goods may be immediately seized on attachment or execution, he would not be encouraged in using his tools and implements and such stock in trade in manufacturing goods. Such a construction of the exemption laws would tend to encourage idleness instead of industry. A mechanic would not like to so use his raw material as to lose both it and his labor. The words "stock in trade," we think, are broad enough to cover, not only the raw materials from which the mechanic intends to manufacture goods, but also to cover the manufactured goods themselves; and they are also broad enough to cover not only goods manufactured for particular customers upon special orders, but also to cover goods manufactured for sale to customers generally, or to any person who might afterward choose to purchase. Some mechanics or tradesmen, like tailors, manufacture nearly all their goods upon special orders, while others, like miners of coal (and the statute specially mentions "miners,") prepare their goods for customers generally, and without reference to special orders, or to whom any specific articles shall go. Now we would suppose that the coal procured by a miner for customers generally would be equally exempt with the coat made by a tailor for a particular customer. The amount exempted as "stock in trade," is of course limited; and if the mechanic, miner, or tradesman, takes a portion of it in manufactured goods, he cannot of course take so much of it in raw material. In the aggregate the value of the articles, manufactured and unmanufactured, exempted, as "stock in trade," cannot exceed four hundred dollars.

The judgment of the court below will be reversed, and cause remanded for a new trial.

All the justices concurring.

Judgment reversed.

GRANT V. DABNEY.

(19 Kans. 388.)

Contract — "support of family" — physician's services.

A requested B to let "C and his family have whatever they might want for their support," and promised to pay him therefor. B, at the instance of the family, employed a physician to attend them. *Held*, that B could not recover from A, for his services and the medicines furnished by him.

THE opinion states the facts.

McClure & Humphrey, for plaintiff in error.

Gilkerson & Lane, for defendant in error.

HORTON, C. J. The facts in this case are substantially these: The plaintiff in error sent to W. E. Dabney a letter, of which the following is a copy:

"VICTORIA, ELLIS COUNTY, *October 1st, 1873.*

"MR. DABNEY—*Dear Sir*: Please let Mr. Seth and family have whatever they may want for their support, and I will repay you for the same.
GEORGE GRANT."

During the months of October and November, 1873, the said W. E. Dabney, at the request of the Seth family, members of whom at the time were very ill, procured one L. Watson, then a practicing physician and surgeon, to attend the family, and during said months Watson furnished medicines and professional services of the value of \$200. The question is presented, whether the plaintiff in error is liable to the defendant in error for said claim under the written instrument above described. The District Court decided he was, and hence this action to reverse the judgment. It is well understood that, in construing written instruments, effect should be given, if possible, to all the words contained therein, and that the language employed should be taking in its usual, common, and ordinary signification. Nothing is contained in the record as to the situation or business of the parties to this action at the date of the letter, or written order, and hence we are not advised of the pur-

pose of the plaintiff in error in delivering the writing, except as we may gather his intentions from the words used by him. We may fairly assume, however, that the defendant in error was not a physician, nor a dealer in medicines, otherwise he would not have employed another to attend and furnish the services and articles sued for to the Seth family in their sickness. Under these rules of construction, and this view of the case, we do not think the action of the defendant in error should have been sustained by the District Court upon the petition in the case and the evidence submitted. The written authority provides that Dabney should *let* the Seth family have whatever they might want for their *support*. Now the word *let*, thus used, ordinarily means to grant possession, to give, to furnish, etc. If A says to B, "Please *let* C have a horse and I will pay for it," the common understanding of the language would be that B was to furnish one of his own horses, or a horse in his possession, to C, and not that D should sell his horse to C and that B should charge and collect of A the value thereof. Again, the word "support" is generally used to mean articles for the sustenance of the family, as food, etc. It is true, in some cases it would include medicines and medical services as necessities; but it is evident to us that it was not the intention or purpose of the plaintiff in error to give the word such a broad signification, and Dabney could not have reasonably so interpreted it. To hold the language of the letter to extend to the claim for medicines and medical treatment furnished by others than the party to whom the letter was addressed, would be giving a forced and strained construction not authorized in the writing. If the meaning of the word "support" is to be extended beyond its common import, it is difficult to determine the limit of the liability assumed by the writer. Further to "*repay*," does not necessarily mean to pay money. It has also the meaning of return, restore, etc.; and to hold that Grant had the right to repay in kind of articles furnished for the support of Mr. Seth and family, would not be at variance with the language of the order. The construction of the court below of the written authority gave to its language an unusual one, and one which the mass of mankind viewing the question would not agree to.

The judgment of the District Court will be reversed.

All the justices concurring.

Judgment reversed.

CASTLE V. HOUSTON.

(19 Kans. 417.)

Libel — justification in civil action.

The Constitution of Kansas provides that : " The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libellous matter was published for justifiable ends, the accused party shall be acquitted." In a civil action against the proprietor of a newspaper for libel, where the defendant justified, the court charged that proof of the truth of the words in question was not a defense, but only went to mitigate damages, and that the defendant must also show that he published the words with good motives and for justifiable ends, and that if he acted honestly, for good purposes, and for justifiable ends, he was to be excused. *Held*, error. The truth of the matter charged is a complete justification.

ACTION for libel by reason of a communication published by the defendant in his newspaper, over the correspondent's signature. The opinion states the facts. The plaintiff had a verdict, which was set aside, and he brought error.

Byron Sherry and Scott Ashton, for plaintiff.

T. A. Hurd, for defendant.

HORTON, C. J. This was an action commenced in the District Court of Leavenworth county, to recover damages for libel. The petition alleges in substance, that the defendant was editor, proprietor, and publisher, of the *Leavenworth Daily Commercial*, a newspaper printed in the city of Leavenworth, and that on the 20th of January, 1875, there was published in the said paper, of and concerning the plaintiff, a certain false and malicious libel, in words as follows, to wit :

" The Insurance Department of our State will in all probability be subject to a thorough investigation, as a bill has already been introduced into the Senate to investigate. This is right. Every

insurance company in the State is willing an investigation be had. Mr. Russell, ex-superintendent, invites it, and the present superintendent is anxious for the same.

"There is a cadaverous-looking individual of Leavenworth loafing around here who seems exceedingly anxious for an investigation, in hopes that the superintendent will be done away with and the department presided over by the auditor. A clerkship in the dim distance makes him enthuse. I cannot blame Castle much, knowing that board and other bills too numerous to mention have been pressing him for some time, and then doubtless the Northwestern Life would be glad to hear from him as he was published as a defaulter to that company. He is one of the most promising individuals (to his landlords) I know of, and the cry of fraud from such a completely played-out insurance agent has but little bearing with an intelligent body of legislators. If his caliber was as large as his bore, he would be a success. JACK."

In answer to the petition, defendant set up three defenses, *first*, an admission that the article complained of was published in defendant's paper, of and concerning the plaintiff, but denied that the same was published with malice; *second*, that defendant had no personal knowledge of the publication of the article at the time of its publication, with the further allegation, that the several matters and things in the article, complained of as defamatory, were true, and published for justifiable ends and purposes; and *third*, a general denial. To the answer plaintiff filed a reply, denying generally, save and except what was admitted, all the allegations in the answer. When the case came on for trial, it was submitted to a jury, and plaintiff obtained a verdict for \$1,250, whereupon defendant gave notice of motion for a new trial, which was filed, and after being argued was by the court sustained, upon the ground that the court had erred in its instructions to the jury. The plaintiff excepted, and has brought the case here for review.

It appears from the record that the court below granted the motion for a new trial on the ground that the jury was misdirected by the following instructions, viz.:

"The fact of the language being true, is not alone an answer to the charge, but can only be shown in mitigation of damages.

"It is not a defense simply to show the truth of the matter pub-

lished, but the party must go further, and show that it was not only true, but that he acted with good motives and for a justifiable end, and that he had some purpose in view that was justifiable. If that be the case, if he acts honestly for good purposes and for justifiable ends, and what he says is true, then he is to be excused or acquitted."

In the condition of the case, we must first inquire whether the instructions above set forth were improperly given on the trial. If erroneous as a statement of the law controlling the case, they certainly may have misled the jury. If correct in principle, and applicable under the issues presented, the court erred in granting a new trial for the reason given. An examination of this question will lead to a brief review of the law of libel in both criminal and civil prosecutions, so far as to consider and determine when a defendant may be permitted to give the truth in evidence as a full justification of alleged libellous matter.

It was at one time the rule of the common law, that the truth of the charge, however honorable and praiseworthy the motives of the publisher, could not be given in evidence in a criminal prosecution. Hence originated the familiar maxim, "The greater the truth, the greater the libel." This doctrine was based upon the theory, that where it was honestly believed a particular person had committed a crime, it was the duty of him who so believed or so knew to cause the offender to be prosecuted and brought to justice, as in a settled state of government a party grieved ought to complain for an injury to the settled course of law; and to neglect this duty, and publish the offense to the world, thereby bringing the party published into disgrace or ridicule, without an opportunity to show by the judgment of a court that he was innocent, was libellous; and if the matter charged was in fact true (thereby insuring social ostracism), the injury caused by the publication was much greater than where the publication was false. A false publication, it was contended, could be explained and exposed; a true one was difficult to explain away. As an additional reason for this rule, it was also held that such publications, even if true, were provocative of breaches of the peace, and the greater the truth contained therein the greater the liability of hostile meetings therefrom. That this was the true rule of the common law has been denied by many of the ablest jurists in both England and America, who maintained that the liberty of

the press consisted in the right to publish with impunity, truth, with good motives and for justifiable ends, whether it respected government, magistracy, or individuals. It certainly was derived from the polluted source of the star-chamber, and was considered at the time an innovation, but like some other precedents, although arbitrarily and unjustly established, it came to be followed generally by the courts, and sustained as the law of the land. In 1804, in the State of New York, this principle of law was recognized and asserted in the case of *The People v. Croswell*. In that case the defendant was prosecuted for libel for having published in his newspaper, at Hudson, in that State, called the *Wasp*, the charge against Thomas Jefferson, then president, that he (Jefferson) paid Callender for calling Washington a traitor, a robber, and a perjurer. The defendant, through his counsel, Alexander Hamilton, applied to the judge at the circuit to put off the trial to obtain the testimony of Callender to prove the publication true. LEWIS, C. J., presiding, denied the motion, because the testimony was inadmissible, as the truth of the facts charged as libellous did not amount to a complete justification. 3 Johns. (N. Y.) Cases, 836. This case attracted so much attention that, after a verdict of guilty had been rendered, and while the case was pending in the courts of New York on a motion for a new trial, the legislature of that State passed a law providing that in every prosecution for writing or publishing any libel, it should be lawful for the defendant, upon the trial, to give in evidence, in his defense, the truth of the matter contained in the publication charged as libellous, and that such evidence should not be a justification, unless it should be further made satisfactorily to appear that the matter charged as libellous was published with good motives and for justifiable ends. Since the adoption of the New York statute declaratory of the law of libel in criminal actions, nearly every State in the Union has made the subject a matter of Constitutional or statutory provision. The wise framers of our own constitution, peculiarly acquainted with the beneficial influences of free discussion and a free press, as participants in the historical incidents and conflicts surrounding the settlement of the Territory of Kansas, modified the tyrannical and harsh rule of the common law as stated in the star-chamber of England, and thereafter generally understood and interpreted, by providing in section 11 of our bill of rights, that —

"The liberty of the press shall be inviolate ; and all persons may freely speak, write, or publish their sentiments on all subjects, being responsible for the abuse of such right ; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libellous matter was published for justifiable ends, the accused party shall be acquitted."

Nevertheless, these framers, in a spirit of wisdom, and to preserve order, were careful not to give, as against the interests of the public, complete license even to the truth when published for the gratification of the worst of passions, or to affect the peace and happiness of society. They prescribe that the *accused* should be acquitted, not on proof of the truth of the charge alone, but it should further appear the publication was made for justifiable ends. Following the intendment of the Constitution, the legislature afterward provided in the act relating to crimes and punishments that —

"In all prosecutions or indictments for libel, the truth thereof may be given in evidence to the jury, and if it appears to them that the matter as charged as libellous was true, and was published with good motives and for justifiable ends, the defendant shall be acquitted." § 272, Gen. Stat. 376.

But the law-makers, jealous of the liberty of the press, and fearing the construction of the law by the courts in such prosecution, further provided in a succeeding section of the same act, that —

"In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact." § 275, Gen. Stat. 377.

While the rule of the common law, as generally applied, was so exacting and rigorous to the defense of justification in criminal prosecutions for libel, a different doctrine was applicable in civil cases. In the case of *King v. Root*, 4 Wend. 114, 139, Chancellor WALWORTH clearly states this difference as follows: "The difficulty which existed in England, previous to Mr. Fox's libel act, was that in criminal prosecutions the defendant was not permitted to give the truth in evidence ; and yet the jury were required to imply malice. But in civil cases, the defendant was permitted to give the truth in evidence as a full justification. Such was declared to be the law by the judges at the time that bill was under discussion in Parliament, and there never has been any alteration

of the law in England on this subject in civil suits." The case of *King v. Root, supra*, was originally tried at one of the circuits in New York before Hon. SAMUEL R. BETTS. The defendants, King and Verplanck, were editors of the *New York American*, printed in the city of New York in 1824. These editors published concerning one Root, lieutenant-governor of that State, among other things, that in August of that year he addressed the State Senate, then in session, "while blind with passion and rum, when he was unwashed, unshaven, haggard, with tobacco-juice trickling from the corners of his mouth, and in a condition outraging all order, decency and forbearance." Root brought a civil action to recover damages for the alleged libel, and the defendants admitted the publication and pleaded the truth as justification. The trial judge instructed the jury, "if the defendants had only published the truth, they had an unquestionable right to do that, and they must be acquitted."

Blackstone, in his Commentaries, asserts that the truth could always be given in civil cases in justification of libel, and seems to consider the defendant's exemption in such instances as extended to him in consideration of his merit in having warned the public against the evil practices of a delinquent. He says that it is *damnum absque injuria*, intimating that the acts of the defendant, who justifies a libellous publication, does not constitute a wrong in its legal sense, and then proceeds to observe that this is agreeable to the reasoning of the civil law. 3 Bl. Com. 125. This is illogical; and Starkie bases this exemption on the better reason, that in such instances the plaintiff has excluded himself from his right of action at law by his own misconduct, and not to any merit appertaining to the defendant. When a plaintiff is really guilty of the offense imputed, he does not offer himself to the court as a blameless party, seeking a remedy for a malicious mischief; his original misbehavior taints the whole transaction with which it is connected, and precludes him from recovering that compensation to which all innocent persons would be entitled. Folkard's Starkie on Slander and Libel, Am. ed., § 692.

There are many good and sufficient reasons why a publisher of a statement, true in fact, yet given to the public with a malicious design to create mischief, should be amenable to the criminal laws, and yet not be liable in a civil action. On general principles no right to damages can be founded on a publication of the truth,

from the consideration that the reason for awarding damages in every such case fails. The right to compensation in point of natural justice is founded on deception and fraud which have been practiced by the defendant to the detriment of the plaintiff. If the imputation is true, there is no deception or fraud, and no right to compensation. The criminal action in libel is supported to prevent and restrain the commission of mischief and inconvenience to society. Take the case of two men who agree to engage together in fisticuffs: the law for the protection of the peace of society and to prevent greater collisions, may arrest and punish both combatants, and yet neither may be able to recover from the other personal damages. Where a person makes the publication solely to disturb the harmony and happiness of society, or to maliciously annoy and injure the feelings of others or to create misery by exposing the latent and personal defects of associates or acquaintances, the interests of the public require some preventive notwithstanding the truth of the publication. This is furnished by the criminal law. But mere injury to the imagination or feeling, however malicious it may be in its origin, or painful in its consequences, is not properly the subject of remedy by an action for damages. Such offenses being unconnected with any substantive right, are incapable of pecuniary admeasurement and redress. They admit of no exact definition; and, therefore, to extend a remedy to such injuries generally, would be productive of great uncertainty and inconvenience, and open far too wide a field of litigation. Again, it seems to be clear that a party who acquires an advantage by concealing the truth, which he could not have attained to had he divulged it, so far is guilty of fraud in the concealment that he cannot upon any principle claim a right to acquire that benefit, and therefore cannot complain that he is injured by the publication of the truth. Starkie, *id.*, 35. In this view the truth hurts no one.

In accordance with the doctrine that the defendant is justified in law, and exempt from all civil responsibility, if that which he publishes be true, it is provided in the Civil Code, section 126, that—

“In all actions mentioned in the last section (libel and slander), the defendant may allege the truth of the matter charged as defamatory, and may prove the same and any mitigating circumstances, to reduce the amount of damages, or he may prove either.”

This section of the Code may be construed to mean, “in actions for libel or slander, the defendant may allege the truth of the mat-

ter charged as defamatory, and may prove the same (as a defense or full justification), and (he may also allege) any mitigating circumstances (in the same answer) to reduce the amount of damages, or he may prove either (the truth as a defense, or mitigating circumstances to reduce the damages)." In other words, under the Code, the truth is a full justification in a civil action; and in the absence of justification, mitigating circumstances may be proved to reduce the damages; and justification and mitigation may be set forth in the same answer, and the defendant may prove either, or both. Gen. Stat. 653.

If it be contended that within the provision of the Constitution the proof of the truth as a defense in a civil action is no justification, except it be also made to appear that the publication was had for justifiable ends, we answer, that in view of the rule of law applicable in such cases at the time of the adoption of the State Constitution, we do not think such a construction proper. It is not in accordance with the spirit or the letter of that instrument. It provides that in civil and criminal actions the truth may be given in evidence to the jury, and where an *accused* is on trial, that is, where a person charged with a crime for the publication of alleged libellous matter is being tried, he is not to be *acquitted* except the publication is true and the same was published for justifiable ends. In that event only is the *accused* party entitled to an acquittal. The word "*accused*" is used in the Constitution; and an "*accused*" being one who is charged with a crime or misdemeanor, it cannot well be said to apply to a defendant in a civil action. If the motive of the party publishing the truth is to be considered in civil suits, under the Constitution, then the section quoted, instead of operating to the protection of individuals charged in personal actions for damages for the publication of alleged libellous matter, as was doubtless intended by the framers of the Constitution, would have the effect to hold parties responsible in cases where at the common law they would be entitled to a verdict. The Constitution contains no grant of powers to the legislature. It is only a limitation on the exercise of its authority; and the legislature, in its discretion, has the right to pass any act not violative of the State or Federal Constitutions. The object of section 11 of the bill of rights was to prevent the passage of any law in Kansas restraining or abridging the liberty of speech and of the press. By it, the harsh rule of the common law, as generally recognized in libel prosecutions, was

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greatly modified ; but we cannot seriously think that it was intended thereby to abrogate that principle of the common law — sustained and upheld under the exacting and arbitrary construction of libels in England — that proof of the truth is a complete justification in all civil actions. Nor can we believe that thereby it was intended that the legislative power of the State was forever deprived of conferring the right upon a defendant in a civil action of libel to plead the truth of the words charged as a full and complete defense. To assert otherwise would be to assert that the Constitution abridged and curtailed the liberty of the press in civil actions more than the common law — more than the provisions of the Constitutions of other States. The modification of the common law by the Constitution we construe in favor of the liberty of the press, not against it. To conclude otherwise would be to ignore the popular sentiment in Kansas at the adoption of the Constitution, and assume that the successful contestants in behalf of a free press were forgetful in their victories of its powerful influences in their behalf, or had unwittingly deprived themselves of rights allowed in England under the sway of despotic monarchs and the rule of arbitrary judges. The Constitution of Rhode Island provides, “in all trials for libel, both civil and criminal, the truth, unless published from malicious motives, shall be sufficient defense to the person charged.” And it was held in that State that the truth of the charge is a good defense in a civil action for libel. *Perry v. Mann*, 1 R. I. 263. From our review of the authorities, the provision of our Constitution, the Civil and Criminal Codes, we deduce these important principles :

First. In all criminal prosecutions, the truth of the libel is no defense unless it was for public benefit that the matters charged should be published ; or in other words, that the alleged libellous matter was true in fact, and was published for justifiable ends ; but in all such proceedings the jury have the right to determine at their discretion the law and the fact.

Second. In all civil actions of libel brought by the party claiming to have been defamed, where the defendant alleges and establishes the truth of the matter charged as defamatory, such defendant is justified in law, and exempt from all civil responsibility. In such actions the jury must receive and accept the direction of the court as to the law.

Under this view, the court below misdirected the jury in a very material point, and properly, on attention being again called to the

matter by a motion for a new trial, granted such motion, and set the case again for hearing. The instructions given might have been applicable in a criminal proceeding, where the motive of the publication is important, and where the jury have the right to determine the law as well as the fact; but were erroneous in a civil action, where the facts charged were proven in justification. The instructions assumed that the truth is not a full and complete defense unless it was shown to have been published for good purposes and justifiable ends. This is not correct. If the charges made by the defendant are true, however malicious, no action lies. *Root v. King*, 7 Cow. 613, 632; *Townsend on Slander and Libel*, § 211; *Foss v. Hildreth*, 10 Allen, 76; *Baum v. Clause*, 5 Hill, 196; 1 Stark. on Slander, 229; *Rayne v. Taylor*, 14 La. An. 406.

The plaintiff in error contends that the instructions could not have been prejudicial to the defendant in error, as the plea of justification was insufficient in form, and therefore the District Court erred in granting a new trial. The answer among other things alleged "that the matters charged as defamatory were true." No motion was filed in the case to make the answer more definite or certain; no demurrer was presented; no objection taken to the evidence of the truth of the charge, as we can ascertain; and from the record we must assume that the case was tried on the theory that the defendant was attempting to show as justification the truth of the publication, and we may assume that the evidence tended to prove the truth of the publication. Under these circumstances the point now made by counsel of the plaintiff as to the immateriality of the instructions is not well taken. The case was heard by the District Court on the supposition that the plea of justification was sufficiently formal — the instructions of the court discuss what is necessary to be shown to make the truth a full justification, and the jury having been misdirected in the hurry of the trial, no error was committed in setting aside the verdict. Had the action of the court been otherwise, on proper application, we would have reversed the judgment. If any delay has resulted to the plaintiff in error in obtaining a speedy trial, it has been caused by the pendency of this proceeding in error in this court, where it was brought by the plaintiff. For this action the defendant in error was not responsible.

The order of the District Court setting aside the verdict of the jury in the case and granting a new trial is affirmed.

All the justices concurring.

STATE V. WHITE.

(19 Kana. 445.)

Criminal law—evidence—prisoner as witness—privileged communications—discharge of jury in absence of prisoner.

On the trial of a criminal information, the prisoner, having testified on his own behalf, cannot, on cross-examination, be required to disclose communications between himself and counsel, in respect to which he did not testify on his direct examination. (*See note, p. 140.*)

On a trial for felony it is proper for the court to discharge the jury, in the absence of the defendant, after they have deliberated without agreeing from four o'clock in the afternoon until six o'clock the next morning.

INFORMATION for bigamy. The opinion states the facts.

Chase, Kirkpatrick & Burge, for appellant.

Willard Davis, attorney-general, for the State.

HORTON, C. J. The defendant White was charged on information with the offense of bigamy. The first jury impanelled to try the cause could not agree, and were discharged without finding a verdict; and another jury, before which the cause was tried at the same term, rendered a verdict of guilty. Thereupon the defendant was sentenced to the penitentiary for the term of three years, and he now appeals to this court.

I. The serious error alleged is, the action of the court in compelling the defendant to disclose the communications between himself and his attorney. Evidence having been admitted concerning a divorce having been granted between the prisoner and his first wife, in the State of New York, prior to the second marriage, the defendant, testifying in his own behalf, was required by the court to answer, on cross-examination, "if he had not been consulted or advised by his counsel in regard to obtaining a copy of such decree." Objection was duly made to the question on the ground that the communications between counsel and client were privileged; but the court overruled the objection, and in so doing committed material error. The defendant in fully answering the question

gave the advice of one of his lawyers to him. The statute provides that an attorney shall be incompetent to testify concerning communications made to him by his client in that relation, or his advice thereon, without the client's consent. This statute would be of no utility or benefit, if the client could be compelled, against his consent, to make such disclosures. It would be absurd to protect by legislative enactment professional communications, and to leave them unprotected at the examination of the client. In such an event, in all civil actions, the confidential statements of client and counsel would be exposed, and likewise the same would occur in all criminal actions where the defendant should testify. The authorities are otherwise. The true view seems to be that communications, which the lawyer is precluded from disclosing, the client cannot be compelled to disclose. This privilege is essential to public justice, for did it not exist no man would dare to consult a professional adviser with a view to his defense, or to the enforcement of his rights. Whart. on Ev., § 583; *Hemenway v. Smith*, 28 Vt. 701; *Carnes v. Platt*, 15 Abb. Pr. (N. S.) 337; *Merrit v. Morgan*, 21 Wend. 467; *Williams v. Fitch*, 18 N. Y. 546-550; *Britton v. Lorenz*, 45 id. 51-59; *Bigler v. Reyher*, 43 Ind. 112; 1 Greenl. on Ev., §§ 236-240. It is urged against a reversal of the judgment that the question might have been answered by "yes," or "no," and that the advice or conversation testified to was not very material, and could not have been prejudicial to the rights of the defendant. We answer that the District Court violated a very important rule of evidence, and forced the disclosure of privileged communications in a criminal case where the liberty of the defendant was at stake; and we will not stop to weigh the effect of the answer, or determine how far the rights of the prisoner were sacrificed. It is very important to public interests that the purpose of the statute as to such communications should be maintained in all its rigor. It is the best rule. *Obsta principiis*. If a client sees fit to be a witness, he makes himself liable to a full cross-examination. But in this case the defendant did not, in his direct examination, refer to his counsel, or any conversation with, or advice from them; and the question was inexcusable. This conclusion disposes of the case in this court, but as some other questions are presented in the briefs of counsel, we briefly give our views of two of them which may upon a new trial again demand the attention of the District Court.

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II. Error is alleged in the discharge of the jury on the 4th of May, 1877, from further consideration of the cause, in the absence of the defendant and his counsel. It appears that the jury, in the charge of the bailiff of the court, were out deliberating in the case after the cause had been duly submitted to them fourteen hours—from four o'clock P. M. of May 3d to six o'clock A. M., May 4th—and the records show that they were discharged because it appeared to the court that the jury could not agree. While it is true that the court should not have had the jurors called into the court room and discharged in the absence of the defendant and his counsel, the error committed thereby was an immaterial one, and for which this court would not reverse the judgment. Neither should the motion, nor the plea in bar filed by the defendant, have been sustained on account of such action. The irregularity of the court consisted in taking action in the absence of the prisoner and his counsel, not in the fact that the jury were discharged after it had been made to appear to the court that they could not agree upon a verdict, and after a finding and entry of this fact were duly made a matter of record. The court had a right to discharge the jury after they had been kept together until it satisfactorily appeared that there was no probability of their agreeing. Gen. Stat., ch. 80; Civil Code, § 281; and ch. 82, Criminal Code, § 208. In the case of the *United States v. Perez*, 9 Wheat. 579, it was held that the court had the right to order the discharge of the jury; and the security which the public have for a faithful, sound and conscientious exercise of this discretion rests in this, as in other cases upon the responsibility of the judge, under his oath of office. And it is held by all the Federal courts, and the courts of Massachusetts, New York, Illinois, Kentucky, Mississippi, Iowa, and some other States, that where the jury have deliberated so long without finding a verdict as to preclude a reasonable expectation that they will agree, unless compelled to do so by famine or exhaustion, they may be discharged, if the record shows the necessity for such action, without the consent of the defendant, and the prisoner to be tried by another jury. In *The State v. Vaughan*, 29 Iowa, 286, it was held in a case very similar to this, that the defendant should have been present at the time the court discharged the jury, but as the defendant if present could only have objected to the action of the court, and since such objection would and must have been unavailing, no prejudice could have resulted from

his absence, and hence such action of the court would not operate to reverse the case, or discharge the prisoner.

[Omitting a question of witness.]

For the error committed in the action of the court in compelling the disclosure of the communications between the defendant and his attorney, the judgment is reversed, and the action remanded for a new trial.

All the justices concurring.

Judgment reversed.

NOTE BY THE REPORTER.—It may be useful to group and examine the adjudications on the subject of the prisoner as a witness, to which the recent statutes permitting accused persons to testify on their own behalf have given birth.

Cross-examination involving crimination.—In *Brandon v. People*, 42 N. Y. 285, the prisoner was asked on cross-examination, "Have you ever been arrested before for theft?" The question was objected to as an attack upon her character, which she had not herself put in issue, but the court held, that "no suggestion of privilege being made, the objection was properly overruled." It was there said: "The defendant, however, appeared before the court below in a double capacity, that of an accused party on trial, and that of a witness. As an accused party on trial, she was entitled to the application of the rule that her character could not be attacked unless she herself opened the question. She had the benefit of it, as the district attorney opened and closed his case, without allusion to her character. She however chose to avail herself of the statute of 1869, which permitted her to make herself a 'competent witness' in the case. She was not compelled to take this position, the statute declaring that the failure to testify should not create any presumption against her. She elected, however, to make herself a witness. She became and was a competent witness. For this purpose she left her position as a defendant, and, while upon the stand, was subject to the same rules, and called upon by law to submit to the same tests which could by law be applied to other witnesses." "She cannot claim the advantages of the position of a witness, and at the same time avoid its duties and responsibilities."

In *Connors v. The People*, 50 N. Y. 240, the prisoner was asked on cross-examination, "how many times have you been arrested?" This was objected to, on the ground that the Constitution provides that "no man can be compelled to be a witness against himself." There was no claim of privilege, and the objection was held to have been properly overruled, on the authority of the *Brandon* case. The court said: "The prohibition in the Constitution is against compelling an accused person to become a witness against himself. If he consents to become a witness in the case voluntarily, and without any compulsion, it would seem to follow that he occupies for the time being the position of a witness with all its rights and privileges, and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His act was the primary cause, and if that was voluntary, he has no reason to complain." The chief judge also observed—this was five years ago—that "the act is not regarded with much favor by the bench, bar, or the people."

We now come to consider together two cases, *People v. Casey*, 73 N. Y. 303, and *People v. Brown*, id. 571. The former was substantially like the *Brandon* and *Connors* cases, and was decided in harmony with them. In the latter, the prisoner pleaded his privilege, or rather his counsel did it for him, and it was held to excuse him from answering. The cases are thus clearly distinguishable, and Chief Judge CHURCH, in the latter, distinguished that case from *Brandon* and *Connors* on the ground that there the witness did not claim his privilege. Judge EARL, who delivered the opinion in the *Casey* case, "concurred in the result" of the *Brown* case, and both were decided at the same term. Some obiter expressions of the chief judge have called forth some criticism. Judge EARL says (pp. 398-9):

"When a prisoner offers himself as a witness in his own behalf, he is subject to the same

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rules upon cross-examination as any other witness. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. Such questions may tend to show that he has before been guilty of the same crime as that for which he is upon trial; but they are not on that account incompetent. When he offers himself as a witness, and seeks to take the benefit of the statute which authorizes him to testify on his own behalf, he takes the hazard of such questions. He must determine, before he offers himself, whether his examination will benefit or injure him. The extent to which such an examination may go to test the witnesses' credibility is largely in the discretion of the trial court."

Chief Judge CHURCH says (pp. 573-4), that persons on trial for criminal offenses, "often by a species of moral compulsion are forced upon the stand as witnesses, and being there are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice or crime of which they may have been guilty or suspected of being guilty, is brought out ostensibly to affect credibility, but practically used to produce a conviction for the particular offense for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly unjust, and every precaution should be afforded to guard against it. I am of the opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offenses, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction for one offense by proof that the accused may have been guilty of others. Such a result can only be avoided practically by the observance of this rule."

It is evident that these different expressions do not conflict with these decisions. The remarks of Judge CHURCH are evidently addressed to the excessive elasticity of "discretion" in trial judges who allow such inquiries, when privilege is not claimed. In Judge EARL's remarks, which are strictly within his case, there is nothing which conflicts with the claim of privilege, and they must be read with reference to the fact that no such claim was set up.

To be distinguished from the *Brown* case is *Commonwealth v. Nichols*, 114 Mass. 285 · 19 Am. Rep. 346. It was there held that where the prisoner becomes a witness, under the statute which makes him "a competent witness at his own request but not otherwise," and testifies that he did not commit the crime of which he stands accused, he may be cross-examined as to every thing relevant to the issue, although he declines to answer on the ground that it would tend to criminate him. The accusation was adultery with one MORRIS, in Middlesex county, and having testified that he never had had criminal intercourse with her then, he was asked whether within a few weeks either way he had had criminal intercourse with her. This was strictly relevant to the issue, while in the *Brown* case the question related to other offenses than that charged in the indictment, and had reference solely to character. This sufficiently distinguishes the cases. The court observe: "A party to the cause, who voluntarily offers himself as a witness, is entitled to no more, and in some respects to less, protection than a third person who testifies in obedience to a summons. A party taking the stand as a witness in his own behalf may be cross-examined in relation to a communication between himself and his counsel, as to which the latter would not be allowed to testify. *Woburn v. Henshaw*, 101 Mass. 193; s. c., 8 Am. Rep. 333. And a refusal to answer a question, on the ground that it might criminate him, is competent evidence against him when it would not be against an ordinary witness. *Andrues v. Frye*, 104 Mass. 284." "The object of these statutes is not to protect or assist criminals, but to promote the discovery of truth," etc.

To the same purport is *State v. Wentworth*, 65 Me. 224; 20 Am. Rep. 688. The prisoner was indicted for illegally selling intoxicating liquors. Being called as a witness on his own behalf, he was asked on cross-examination concerning other sales than the one in question. His counsel objected on the grounds of irrelevancy and privilege. It was held that the accused had waived his constitutional privilege by becoming a witness, that he could not claim his privilege against the questions asked him, and that the privilege was his alone, and not that of his counsel. On the last ground the decision is inconsistent with the *Brown* case, for there the privilege was claimed by counsel for the witness. The questions were held to be pertinent to the issue, to prove or tend to prove the sale in question. The court say: "A sale is denied. Before selling, he must have liquors to sell. Selling

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implies having. It is important to prove having. Having been admitted, for what purpose were they"—(i. e., bottles of liquor)—"had?" etc. To prove the "having" it was not necessary to prove the former "selling." It seems to us that the proper distinction is this: "While the prisoner, having made himself a witness, cannot decline to answer relevant inquiries on the ground that it may tend to convict him of the crime in question, yet he may decline to answer such inquiries as tend to convict of other offenses not in question." To sustain the ruling on the point that the privilege was not asserted by the party himself, the court cite the *Brandon* and the *Connors* cases, which do not involve or discuss this point.

Cross-examination involving confidential communications.—In *Dullenhofer v. State*, 31 Ohio St. 91, it is held that where the accused in a criminal trial becomes a witness on his own behalf, he cannot be compelled, on cross-examination, to disclose the confidential communications between himself and his attorney, nor can such disclosures be required of the attorney without the consent of the accused. The well-known general rule of jurisprudence is that when an attorney is employed by a client professionally, all the communications that pass between the client and the attorney, in the course and for the purpose of the professional business, are privileged, and the privilege is the privilege of the client, and not of the attorney. *Herring v. Cloberry*, 1 Phill. 91; *Pearse v. Pearse*, 1 DeG. & Sm. 26. The privilege applies to the communication, and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or from his legal adviser. And it is held that the privilege is not in any way affected by the statutes making parties witnesses. *Montgomery v. Pickering*, 116 Mass. 227; *Brand v. Brand*, 39 How Pr. 183; *Darker v. Kuhn*, 38 Iowa, 385. In *Bigler v. Reyher*, 43 Ind. 113, it was held that a party, having given evidence in chief in his own behalf, cannot, on cross-examination, be compelled to divulge statements made by him when consulting as a client an attorney at law, and that such communications are privileged and protected from inquiry when the client is a witness, as well as when the attorney is a witness. See, also, to the same effect, *Hemenway v. Smith*, 28 Vt. 701; *Boho v. Bryson*, 21 Ark. 337. But in *Inhabitants of Woburn v. Henshaw*, 101 Mass. 200, the contrary was held, the court saying: "The objection that the defendant was wrongfully compelled to undergo a cross-examination, as to what he said to his counsel, cannot be sustained. The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client, but if the client sees fit to be a witness, he makes himself liable to full cross-examination, like any other witness." See, also, upon the general subject, *Maas v. Block*, 7 Md. 202; *Jenkinson v. State*, 5 Blackf. 463.

Comment on omission or refusal to testify.—Under most statutes the prisoner is humanely protected from adverse comment on his omission to testify. This is not so in Maine. Thus, in *State v. Cleaves*, 59 Me. 296; 8 Am. Rep. 423, it was held that it was correct for the judge to charge the jury, that the omission of the defendant to take the stand was a proper consideration in determining his guilt or innocence. The court say: "His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determining the guilt or innocence of the accused?" And the court compare such omission to the looks, speech or silence of the accused when charged or on trial. The vice of this reasoning is that the demeanor of the accused is no criterion of his guilt or innocence. Embarrassed innocence and brazen guilt are seen daily in criminal courts. The omission to testify may simply result from an utter inability to explain circumstances. The plea of not guilty is equivalent to a denial of the crime. And yet the court say in this case, that the statute was passed "for the benefit of the innocent and for the protection of innocence." On the other hand, in New York, Ohio and California, it is held that the omission shall not be commented on. We presume that the Ohio and California statutes, like that of New York, provide that the omission "shall not create any unfavorable presumption." *Ruloff v. People*, 45 N. Y. 218; *People v. Tyler*, 86 Cal. 522; *Calkins v. State*, 18 Ohio St. 366.

In Massachusetts it is held that, as by the statute the omission of the prisoner to testify is not to create any presumption against him, so the prosecuting attorney will not be allowed to comment to the jury on such omission, although in answer to reasons advanced by the prisoner's counsel to the jury for such omission. *Commonwealth v. Scott*, 123 Mass.

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289; 35 Am. Rep. 37. The court here say: "As there is danger that the jury, knowing that the law now permits a defendant to testify, may draw inferences against him from his omission to do so, his counsel may properly, in addressing the jury, insist and enlarge upon his constitutional and legal right in this respect. When the counsel for the defendant in the present case went further, and referred to his own opinion and practice upon the subject, and to what he supposed to have taken place in other cases, he might well have been checked by the court. But the absolute exemption, secured to the defendants by the Constitution and laws, from being compelled to testify, and from having their omission to do so used in any way to their detriment, could not be affected by superfluous or irregular suggestions of their counsel in the heat of argument. That exemption could only be waived by each defendant's own election to avail himself of the statute, and to go upon the stand as a witness."

In *Long v. State*, 56 Ind. 183; 26 Am. Rep. 19, it was held that a new trial must be granted in case of conviction, where the prosecuting attorney commented on the omission of the prisoner to testify, although the court, on his objection, had checked the attorney in his remarks, and instructed the jury to pay no attention to what had been said. This was under a statute prohibiting any comment upon, or reference to, such omission, in the argument, and any consideration thereof by the jury. All that the district attorney said in this case was: "It is true, gentlemen of the jury, the evidence in this case is not as clear as it might be. There were but two parties to this transaction. You have heard the evidence of one of them. We would have been pleased to have heard from the other, to see what light he could have thrown upon this transaction." But this was considered fatal, and the court said: "We construe the statute to mean, that, when a defendant in a criminal cause declines to testify in his own behalf, absolute silence on the subject is enjoined on the counsel in their argument on the trial, and upon the jury trying the cause during their consultation upon it."

In *State v. Ober*, 52 N. H. 459; 13 Am. Rep. 88, the prisoner declined to answer a question on cross-examination on the ground that he could not be compelled to furnish evidence against himself. In summing up, the district attorney commented on the refusal and was permitted to do so, in spite of objection. This was held proper, the statute only protecting the prisoner from adverse comment or inference in case he refuses to testify at all. Citing *Com. v. Mullen*, 37 Mass. 545, and the *Connors case*. In his work on *Constitutional Limitations* (3d ed.), 317, Judge COOLEY approves this case, saying, "the right of comment, where the party makes himself his own witness, and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstained from asserting his statutory privilege."

In *Ruloff v. State*, 45 N. Y. 213, it was held that the error of the court in alluding, in its charge, to the omission of the prisoner to testify, was cured by his subsequent charge that he was not required to testify, and that there was no inference to be drawn against him from the fact of his not having testified. This is quite opposed to the *Long case*. In the *Ruloff case* the court remarked: "The act may be regarded as of doubtful propriety, and many regard it as unwise, and as subjecting a person on trial to a severe if not cruel test. If sworn, his testimony will be treated as of but little value, will be subjected to those tests which detract from the weight of evidence given under peculiar inducements to pervert the truth when the truth would be unfavorable, and he will, under the law as now understood and interpreted, be subjected to the cross-examination of the prosecuting officer, and made to testify to any and all matters relevant to the issue, or his own credibility or character, and under pretense of impeaching him as a witness, all the incidents of his life brought to bear with great force against him. He will be examined under the embarrassments incident to his position, depriving him of his self-possession, and necessarily greatly interfering with his capacity to do himself and the truth justice, if he is really desirous to speak the truth. These embarrassments will more seriously affect the innocent man than the guilty and hardened in crime. Discreet counsel will hesitate before advising a client charged with high crimes to be a witness for himself, under all the disadvantages surrounding him. If, with this statute in force, the fact that he is not sworn can be used against him, and suspicion be made to assume the form and have the force of evidence, and circumstances, however slightly tending to prove guilt, be made conclusive evidence of the fact, then the individual is morally coerced, although not actually compelled to be a witness

against himself. The Constitution, which protects a party accused of crime from being a witness against himself, will be practically abrogated." They then continue: "Neither the prosecuting officer or the judge has the right to allude to the fact that a person has not availed himself of this statute." They then admit that the judge twice made allusion to the fact on the trial in question, "on both occasions in a manner calculated to give an impression prejudicial to the prisoner." But, "inasmuch as the error of this part of the charge was that by its general terms it authorized an inference to the prejudice of the prisoner, rather than a direct statement of an erroneous proposition, we are of opinion that the error was cured by the subsequent explanation."

Comments on effect of testimony.—In *Stover v. People*, 56 N. Y. 315, it was held that where a prisoner elects to become a witness, and fails to explain or rebut a fact tending to show his guilt, the same presumption arises from his failure that would arise in the like case of any other witness, if it was in his power to give such explanation. It is here said: "The general rule is that when it appears that a party charged with crime has the power, if innocent, to explain a fact or circumstance tending to show his guilt, and fails to give such explanation, such failure may be considered as a circumstance against him. In the present case, the question is whether his failure to give any explanation of such a fact or circumstance, which he could do if innocent, when testifying in his own favor, he having requested to become a witness, comes within this general rule. The argument in behalf of the accused is, that he cannot be made a witness at all except by his own request, and that his failure to be a witness shall not create any presumption against him, and that if he requests to be a witness and becomes such, he need give testimony only to such parts of his case as he may choose; and as to other facts as to which he does not request or desire to give testimony, no presumption can be created against him for his failure to testify. In this construction I cannot concur. True, it is at the option of the accused whether or not to become a witness. When he has exercised this and become a witness, he is made competent for all purposes in the case," etc., concluding as first above indicated. Three judges concurred, and one concurred in the result, but the chief judge and another dissented.

It has been held error, when the prisoner had testified, for the judge to instruct the jury that "one interested will not usually be as honest and candid as one not so." *Veach v. State*, 56 Ind. 584; 26 Am. Rep. 44. The court quotes from a former decision on the same point:

"We think the court erred in giving the latter part of the charge. The idea is conveyed by the charge, that, in a majority of instances, or as a usual rule, subject of course to exceptions, persons interested will not be as honest and candid as those who are not interested. This may be true, in point of fact, and if so, it is a sad commentary upon the honesty and candor of a majority of mankind. But, if the proposition be true, it is not a legal presumption, but matter of fact, of which the jury were the exclusive judges, and concerning which the court could not, without going out of its province, undertake to instruct them. It was the exclusive province of the jury to determine, from their knowledge of mankind, from the evidence in the cause, and from the appearance and manner of the witness, what credit was due to his evidence, and whether any, and if so, how much, credence should be withheld in consequence of his interest in the cause. It was, in short, the exclusive province of the jury to determine whether one interested would or would not usually be as honest and candid as one not interested."

Comments on appearance of prisoner.—The prohibition of comment has been held not to extend to remarks upon the prisoner's appearance while testifying. Thus, in *Huber v. State*, 57 Ind. 341; 26 Am. Rep. 57, the prosecuting attorney had said: "The evidences of guilt are stamped upon the countenance of the defendant." This was objected to, and the court, in the hearing of the jury, said, "take your objection." On review the court said: "The prosecutor had the right to refer to the countenance of the defendant while testifying as a witness, as one of the tests of his credibility. Considered as an abstract proposition, aside from the defendant's appearance as a witness, these remarks would seem to transcend the limit of legitimate argument on the trial of a criminal cause; but the objection of the appellant to their utterance, so far as we are enabled to judge of what occurred on the occasion, was sustained by the court, and their impropriety thus brought to the attention of the jury. As the proceeding comes to us from the record, we cannot hold that it constituted such an error of law on the trial as amounted to a sufficient cause for a new trial."

Impeachment of prisoner.—In Indiana it has been held that, where the accused

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has testified, the prosecution may show that his reputation for truth and veracity is bad, but cannot impeach his general moral character, although the Civil Code provides that, "in all questions affecting the credibility of a witness, his general moral character may be given in evidence. This is based on the common-law doctrine that the inquiry into the character of a witness is limited to truth. The court say, "the statute is an innovation upon the common law, and should be strictly construed." *Fletcher v. State*, 49 Ind. 294; 29 Am. Rep. 673.

But in Massachusetts it is held that the prisoner, having testified, may be impeached, like an ordinary witness. *Commonwealth v. Bonner*, 97 Mass. 587.

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(19 Kans. 451.)

Divorce — jurisdiction — impeaching judgment collaterally.

A decree of divorce, rendered in a State where neither of the parties had ever resided, and without actual notice to the defendant, is absolutely void, and if the lack of jurisdiction does not appear on the face of the record, it may be shown by extrinsic evidence.*

ORDER for alimony. The opinion states the facts.

John Foster, for plaintiff in error.

J. G. Mohler, for defendant in error.

VALENTINE, J. This was an action brought by Blanche Litowich, against B. A. Litowich, Ed. Wittman, and Ray Hollingsworth, for the purpose of obtaining alimony from said Litowich, her alleged husband, and of restraining all the defendants from selling or disposing of the property of her said alleged husband. At the time of the commencement of this action the plaintiff obtained an order from the judge of the court below, at chambers, granting to her, as alimony *pendente lite* (using the word "alimony" in a broad sense, including suit money), \$100 for attorney-fees and expenses of the suit, and \$100 for her support, and restraining the defendants from disposing of any of her husband's property except "in the due course of their trade and business as merchants in the town of Salina." Afterward the defendants moved to vacate said order. Pending this motion, the plaintiff moved for an attach-

*See *Houd v. State* (56 Ind. 263), 26 Am. Rep. 21, and note, 27.

ment against said Litowich, requiring him to answer for an alleged contempt in not obeying said order with respect to the payment of alimony. By consent of parties these two motions were heard together, and at the same time. It would also seem that the judge of the court below also heard still another motion at the same time, made by the plaintiff for additional alimony. A vast amount of evidence was introduced upon the hearing of these motions, and upon this evidence the judge vacated said order with respect to Hollingsworth, and after modifying such order in some particulars with respect to the other two defendants continued it in force substantially as to them. The judge refused to grant the attachment asked for by the plaintiff, and refused to give her any additional alimony. Defendants Litowich and Wittman excepted to the rulings of the judge of the court below against them. They also moved for a rehearing of their motion to vacate said order, which motion was also overruled, and they duly excepted; and they now bring the case to this court for review.

While the judge of the court below may have committed some immaterial errors, we cannot say that he committed any substantial error. It would seem to us that alimony *pendente lite* should have been allowed in this case; and we cannot say that \$200, including suit money, was too much. And we also think, that under the circumstances of this case the injunction *pendente lite* was also proper. That the said B. A. Litowich and Blanche Litowich were married to each other on March 26, 1876, and that they remained husband and wife from that time up to April 5, 1877, is admitted by all the parties. The plaintiff claims that she still remains the wife of said B. A. Litowich. But the defendants claim that on the 5th of April, 1877, the said B. A. Litowich was divorced from the plaintiff, and that the marriage relation then existing between them was wholly severed and dissolved. And to prove such divorce, the defendants introduced in evidence a duly certified copy of a judgment rendered by the probate court of Davis county, Utah Territory, purporting to grant such divorce. This judgment shows upon its face that there had been "pleadings," and a "summons," and "service of summons," and "proof" in the case in which it was rendered; and yet no such pleading, or summons, or service, or proof, was introduced in evidence on the hearing of the motions in this case. The judgment upon its face seems to be valid; but whether it would still appear to be

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valid if the whole of the record of the case in which it was rendered had been introduced in evidence, we cannot tell. But from evidence *dehors* the record we know that said judgment is void absolutely and entirely. It was rendered wholly without jurisdiction. The parties thereto, B. A. Litowich and Blanche Litowich, were married in Kansas. They resided together in Salina, Kansas, up to the 8th of January, 1877, when Mrs. Litowich went to her mother's at Atlantic City, N. J., expecting her husband soon to sell his property in Kansas and follow her. Afterward he did sell said property (the sale, however, was probably a sham sale), and then on the 5th of March, 1877, leaving Salina, went to Denver, to Cheyenne, and to Chicago, Ill., where he employed a lawyer (A. J. Dexter, by name), to procure a divorce for him. The lawyer procured said Utah divorce. Neither of the parties had ever resided in Utah, neither of them had ever been there. And neither of them had ever had any expectation of residing there. After procuring said divorce said B. A. Litowich returned to Salina by way of Kansas City, reaching Salina on the 14th of April, 1877. He then repurchased his former interest in a mercantile establishment located at Salina, and is now residing there and doing business there as a merchant. On the same day that he returned to Salina he wrote to his wife concerning said divorce, and this was the first notice that she ever received from any source that he had any intention or desire to procure a divorce. The letter is as follows :

SALINA, KANSAS, *April 14, 1877.*

Mrs. BLANCHE : I received your letter. I just got to Salina. I am living in Chicago, Ill., and think to go back there soon. I shall not remain in Salina only two days longer. I have sued you for a divorce at Chicago. Would have notified you before, but was not sure where you were. Don't write to me any more. Try and think of some one else. Respectfully, B. A. LITOWICH.

Mrs. Litowich, having learned that her husband had remained at Salina, subsequently returned, and on 31st August, 1877, she commenced this action for alimony. We think that said parties B. A. and Mrs. Litowich were still husband and wife when this action was commenced, and are now husband and wife. Said Utah judgment, being void for want of jurisdiction, did not change their matrimonial status, nor affect any of their rights with respect to

each other. That a judgment rendered without jurisdiction is void, we have assumed as settled law. And the Supreme Court of Indiana has recently decided that a judgment granting a divorce rendered by a probate court in Utah, upon jurisdictional facts and circumstances almost precisely like those upon which the present judgment was rendered, was a judgment rendered without jurisdiction and consequently void. *Hood v. The State*, 56 Ind. 263; 26 Am. Rep. 21. And this decision of the Supreme Court of Indiana is in accordance with the unbroken current of authority. 2 Bishop's *Marriage & Divorce*, § 144. And where the judgment granting the divorce does not appear to be void upon its face, it may be shown to be void by evidence *aliunde*. *Hoffman v. Hoffman*, 46 N. Y. 30, 33; 7 Am. Rep. 299; *Kerr v. Kerr*, 41 id. 272; *Borden v. Fitch*, 15 Johns. 121, 141; *Leith v. Leith*, 39 N. H. 20; *Pollard v. Wegener*, 13 Wis. 569, 576. And indeed any judgment from a sister State, void for want of jurisdiction, may be shown to be void in any proceeding, direct or collateral, and by evidence *dehors* the record, provided that the record itself does not show the invalidity of the judgment upon its face. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light Co.*, 19 id. 58; *Rape v. Heaton*, 9 Wis. 328, 332; *Price v. Ward*, 25 N. J. Law (Dutch.), 225; *Aldrich v. Kinney*, 4 Conn. 380; *Starbuck v. Murray*, 5 Wend. 148, 156; *Skumway v. Stillman*, 6 id. 447, 452; *Hall v. Williams*, 6 Pick. 232, 237; *Carlston v. Bickford*, 13 Gray, 591; *Pollard v. Baldwin*, 22 Iowa, 328; *Norwood v. Cobb*, 15 Texas, 500; s. c., 24 id. 551. In Ohio it has been held that even if the foreign judgment granting a divorce to the husband, without jurisdiction of the wife, and while she resided in Ohio, were sufficient to dissolve the marriage relation, still that such a judgment would not be any bar to an action afterward brought by the wife in Ohio against her said husband to procure alimony. *Cox v. Cox*, 19 Ohio St. 502, and 20 id. 439; 2 Am. Rep. 415.

[Omitting the consideration of the question of alimony.]

Orders affirmed.

All the justices concurring.

Mastin v. Gray.

MASTIN V. GRAY.

(19 Kana. 438.)

Judgment — domestic — collateral impeachment, for want of jurisdiction.

In an action to recover real estate, the plaintiff's title was founded on a sheriff's deed executed in pursuance of a sale on execution on a judgment of a justice of the peace, rendered by default, on a constable's return of service of the summons by "leaving a certified copy at the defendant's usual place of residence." *Held*, that evidence was admissible to show that the return was false, in that the defendant was not, and had no residence, in Kansas, but was and had long been in, and a resident of, the Indian Territory.*

EJECTMENT. The opinion states the facts. The defendant had judgment, and the plaintiff brought error.

F. M. Black and *D. B. Hadley*, for plaintiff.

B. Gray, defendant, for himself.

VALENTINE, J. This was an action in the nature of ejectment. The plaintiff claims title to the land in controversy, under a sheriff's deed, purporting to convey such land from one Jane Hicks Brown, the judgment debtor, to one of the persons under whom the plaintiff claims. The defendant Gray claims title under a deed executed by said Jane Hicks Brown herself. The main question in the case is, whether said sheriff's deed is valid or not. But involved in this question are these other questions: Can a constable's return of service on an original summons in a justice's court, and all subsequent proceedings founded thereon, including a sheriff's deed, be impeached in an action in the nature of ejectment by evidence *aliunde* showing said constable's return to be false, and showing that the defendant in the justice's court never in fact had any notice of the pendency of the suit in such court?

It appears from the record in this case that, on the 15th of December, 1860, one S. P. Bartlett commenced an action in a justice's court, in Wyandotte county, on two promissory notes against

* See *Hood v. State* (56 Ind. 263), 26 Am. Rep. 21, and note, p. 27; *Ferguson v. Crawford* (70 N. Y. 253), 25 Am. Rep. 590.

said Jane Hicks Brown. A summons was duly issued by the justice and delivered to H. H. Sawyer, constable. Afterward the constable returned the same with the following indorsement thereon, to wit: "Executed on the 15th December, 1860, by leaving a certified copy at the usual place of residence of the within named defendant, Jane Hicks Brown. H. H. Sawyer, constable." Jane Hicks Brown made no appearance in the justice's court; and therefore the justice at the proper time rendered judgment against her by default for \$38.85 and costs. A transcript of this judgment was duly filed in the District Court, execution was issued thereon, said land was sold under the same, the sale was duly confirmed by the District Court. The sheriff then, on March 25th, 1865, executed a deed for the land to the purchaser, which deed was duly recorded February 1st, 1866. The purchaser took possession of the land under his deed, and he and those holding under him continued to hold the possession thereof until in 1871, when B. H. Tertelling, the then holder of said land under said sheriff's deed, having mortgaged the land to the plaintiff in this case, and having become a bankrupt, abandoned the land, and Barzillai Gray, the holder of the adverse title, took possession thereof. The land was sold under the bankruptcy proceedings against Tertelling, and Mastin, the plaintiff in this action, became the purchaser for the purpose of obtaining payment of his said mortgage. He received his deed from the assignee in bankruptcy on the 30th of August, 1872. Now if said sheriff's deed is valid, then the land in controversy belongs to the plaintiff Mastin; but if it is not valid, then the land belongs to defendant Gray; and the whole question depends upon the validity or invalidity of said constable's return. It also appears from the record in this case that Jane Hicks (that was her maiden name) was a Wyandotte, Indian, woman. In the spring of 1860, she resided in Wyandotte county, in this State, with a Wyandotte, Indian, man, by the name of Leander Brown. Whether they were married or not, is not shown. During that spring they had a misunderstanding, and Jane Hicks left Brown and went to the Indian Territory to reside. Afterward Brown married another woman, with whom he lived for seven years; but in 1869 he commenced to live with Jane Hicks again. Jane Hicks remained in the Indian Territory during the whole of the remainder of the year 1860, after she first went there, and she had no residence in Kansas after the spring of 1860. Therefore the return of the constable, that he

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served said summons on the 15th of December, 1860, "by leaving a certified copy at the usual place of residence" of said Jane Hicks Brown, cannot be true. He probably left the copy at the residence of said Leander Brown, but whether he did or not, is not shown by the record.

We now come to the question whether said constable's return, and the subsequent proceedings founded thereon, including the sheriff's deed, can be impeached in this action by evidence *aliunde*. A sheriff's deed founded on a void judgment is of course void. *North v. Moore*, 8 Kans. 143; *Shields v. Miller*, 9 id. 390. A judgment rendered without jurisdiction is void. *Butcher v. Bank*, 2 Kans. 70. And a personal judgment, rendered without notice to the defendant, is rendered without jurisdiction, and is consequently void. *Case v. Hannahs*, 2 Kans. 490, 496; *K. P. Ry. Co. v. Streeter*, 8 id. 133. This far we think all the authorities agree. A sheriff's return of service of original process may, in a direct proceeding, and before judgment, be impeached so far as such return states facts which do not come within the personal knowledge of the sheriff himself; such facts, for instance, as where "the usual place of residence" of the defendant is located. *Bond v. Wilson*, 8 Kans. 228. This proposition is denied in Missouri. *Hallowell v. Page*, 24 Mo. 590. In many cases such a return may be impeached for falsity, even after judgment is rendered thereon; and the judgment itself may be declared void. *Knowles v. Gas-light Co.*, 19 Wall. 59; *Carleton v. Bickford*, 13 Gray, 591; *Norwood v. Cobb*, 15 Texas, 500; s. c., 24 id. 551. And probably in all cases such a return may be impeached in a direct proceeding to perpetually enjoin the judgment founded on such return, because of the falsity of such return. *Chambers v. Bridge Co.*, 16 Kans. 270; *Earl v. McVeigh*, 91 U. S. 503; 3 Cent. L. J. 689. This proposition is also disputed; and particularly in Nebraska it is disputed. *Johnson v. Jones*, 2 Neb. 126. Though in the Nebraska case it was really not necessary for the court to decide the question.

A judgment void for want of notice may be set aside at any time even after the lapse of more than three years, on a motion made therefor by the defendant. *Foreman v. Carter*, 9 Kans. 674. And this may be done in some cases even where it requires extrinsic evidence to show that the judgment was rendered without notice and without jurisdiction. *Hanson v. Wolcott*, 19 id. 207. Where the record itself shows that the judgment was rendered without notice,

and without jurisdiction, all the courts unite in holding that the judgment is void, and may be impeached anywhere, and collaterally as well as directly. Where the record is silent on the subject, a majority of the courts hold that the record may be impeached collaterally as well as directly, and by extrinsic as well as internal evidence. And a great majority of the courts hold that a judgment from another State may be impeached for want of jurisdiction collaterally as well as directly, and by extrinsic evidence as well as by the record itself. *Litowich v. Litowich*, ante, p. 145, and cases there cited. But the difficult question to determine arises when it is attempted to impeach a domestic judgment collaterally, and by extrinsic evidence. There are authorities which hold that it cannot be done. *Hahn v. Kelley*, 34 Cal. 391; *McDonald v. Leewright*, 31 Mo. 29; *Callen v. Ellison*, 13 Ohio St. 446; *Johnston v. Jones*, 2 Neb. 126; *Wilcox v. Kassick*, 2 Mich. 165; *Granger v. Clark*, 22 Me. 128; *Cook v. Darling*, 18 Pick. 393; *Finneran v. Leonard*, 7 Allen, 54; *Lightsey v. Harris*, 20 Ala. 409; *Coit v. Haven*, 30 Conn. 190. While there are other authorities which hold that it may be done. *Ferguson v. Crawford*, 70 N. Y. 253; 26 Am. Rep. 589; *Adams v. Saratoga & Wash. Railroad Co.*, 10 N. Y. 328, 332; *Bolton v. Jacks*, 6 Robt. 166, 198; *Porter v. Bronson*, 29 How. Pr. 292; *Tebbetts v. Tilton*, 31 N. H. 273; *Sanborn v. Fellows*, 22 id. 473, 488. And there are many authorities which tend to uphold the doctrine that any judgment rendered without jurisdiction may be impeached in any proceeding; and that in doing so, any thing contained in the record (of which such judgment forms a part) purporting to give or prove jurisdiction, such as the recital of a sheriff's return, or service of summons, or a service by publication, or any constructive service, or any appearance by attorney, or a finding by the court of such service, notice, or appearance, may be impeached and contradicted by any evidence, extrinsic as well as intrinsic, and may be shown to be untrue and false. *Elliott v. Peirsol*, 1 Pet. 328, 340; *Hickey v. Stewart*, 3 How. 750; *Shelton v. Tiffin*, 6 id. 163; *Williamson v. Berry*, 8 id. 495, 540; *Webster v. Reid*, 11 id. 437, 460; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light Co.*, supra; *Earl v. McVeigh*, supra; *Borden v. Fitch*, 15 Johns. 121, 141; *Latham v. Edgerton*, 9 Cow. 227; *Starbuck v. Murray*, 5 Wend. 148, 156; *Shumway v. Stillman*, 6 id. 448, 453; *Dobson v. Pearce*, 12 N. Y. 164; *Kerr v. Kerr*, 41 id. 272; *Rape v. Heaton*, 9 Wis. 328, 332; *Pollard v. Wegener*, 13 id.

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569, 576; *Russell v. Perry*, 14 N. H. 152; *Norwood v. Cobb*, 15 Texas, 500; s. c., 24 id. 551; *Horan v. Wahrenberger*, 9 id. 313; *Price v. Ward*, 25 N. J. Law (1 Dutch.), 225; *Carleton v. Bickford*, 13 Gray, 591; *Aldrich v. Kinney*, 4 Conn. 380; *Miller v. Handy*, 40 Ill. 448; *Cooper v. Sunderland*, 3 Iowa, 114, 127; *Pol-lard v. Baldwin*, 22 id. 328.

The decisions upon the question which we are now discussing are conflicting and contradictory, and of course they cannot all be good law. The case of *Hahn v. Kelley*, *supra*, is disapproved in the case of *Galpin v. Page*, 3 Sawyer, 94, 106 (this last decision following that of *Galpin v. Page*, 18 Wall. 350). The case of *McDonald v. Leewright*, *supra*, is decided upon the sole ground that a sheriff's return cannot be impeached in any case, except in an action against the sheriff for a false return, which ground, as we have already seen, is wholly untenable in Kansas. The case of *Callen v. Ellison*, *supra*, seems to enunciate the doctrine that a judgment rendered upon an appearance by an attorney, cannot be impeached in a collateral proceeding by showing that such attorney had no authority to make any such appearance. The decision in the case last mentioned may perhaps not go quite to this extent. If it does not, then it is not applicable to this case; but if it does, then it will be found to be in conflict with the following decisions heretofore cited, to wit: *Shelton v. Tiffin*, *Starbuck v. Murray*, *Shumway v. Stillman*, *Kerr v. Kerr*, *Price v. Ward*, and *Aldrich v. Kenney*. See, also, *Bodurtha v. Goodrich*, 3 Gray, 508.

The decision in the Nebraska case of *Johnson v. Jones*, *supra*, relating to the impeachment of judgments for want of jurisdiction, is but little more than *dictum*, and very bad *dictum*, too. The case itself would have been decided in precisely the same way that it was decided, even if the question of jurisdiction had not been raised. The effect of this decision, or rather *dictum*, is as follows: Where a judgment is rendered against a person who has never had any notice either of the action or of the judgment, he must, nevertheless, take notice thereof within the time "provided by law for appeal, review, rehearing, or impeachment by writ of error," and resort to such remedy, or he will be forever remediless. It is his own fault if he does not ascertain within such time that such judgment was rendered against him. He has no right to remain ignorant of the rendition of such judgment, and consequently to remain quiet and inactive. He has no right to wait until he receives

actual notice of the judgment, by an attempt being made to enforce it against him ; and if he does so wait, he cannot then maintain an action to have the judgment declared void, or to perpetually enjoin its enforcement.

The Michigan case of *Wilcox v. Kassick*, *supra*, was an action of debt on a judgment from a sister State. The record upon its face showed jurisdiction, and the judgment appeared to be valid ; and the court in that case held that such judgment could not be impeached for want of jurisdiction. There are other cases holding the same thing which we have not cited. They so hold upon the theory that a judgment from a sister State is just as good as a domestic judgment, and that a domestic judgment could not be so impeached. The theory that a judgment from a sister State is entitled to the same faith and credit as a domestic judgment, is unquestionably correct. It is sustained by all the authorities, from the decision in the case of *Mills v. Duryea*, 7 Cranch, 484, down to the present day. And of course, if a domestic judgment cannot be impeached collaterally, and by extrinsic evidence, a judgment from a sister State cannot be so impeached. But the authority is now overwhelming that a judgment from a sister State may be so impeached. (See cases cited in case of *Litowich v. Litowich*, *ante*, p. 145). And hence the decision in the case of *Wilcox v. Kassick* cannot be considered as very high authority for the doctrine that a domestic judgment cannot be impeached.

The cases of *Granger v. Clark*, and *Cook v. Darling*, *supra*, do not seem to have received much consideration from the courts that decided them ; and the decision in the case of *Finneran v. Leonard*, *supra*, is founded on that in the case of *Cook v. Darling*. The case of *Cook v. Darling* makes a distinction between the records of courts of superior jurisdiction and courts of inferior jurisdiction—holding that a judgment of an inferior court may be impeached collaterally for want of jurisdiction, while a judgment of a superior court cannot be so impeached. The judgment sought to be impeached in the case at bar is a judgment of a court of inferior jurisdiction. The case of *Lightsey v. Harris*, *supra*, is very much like the case of *McDonald v. Leewright*, *supra*. The case of *Coit v. Haven*, *supra*, is like the case of *Cook v. Darling* in making a distinction between courts of superior and inferior jurisdiction.

Several of the cases cited as showing that judgments may be impeached collaterally for want of jurisdiction, are open to objections

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as to their exact applicability to the case at bar. But still it will be found in all of them that either the decision of the court itself, or the language of the judge in delivering the opinion of the court, is applicable. Of course, all decisions made by State courts concerning the impeachment of domestic judgments collaterally, and by extrinsic evidence, are exactly applicable to the present case, unless such decisions are controlled by local statutes. Also all decisions made by Federal courts, in cases commenced in the same State in which the judgments sought to be so impeached were rendered, are clearly applicable. This includes the decisions in the cases of *Elliott v. Piersoll*, *Hickey v. Stewart*, *Shelton v. Tiffin*, *Williamson v. Berry*, and *Webster v. Leid*, *supra*. If this case had been commenced in the Federal courts instead of in the State courts, as it was, the Federal courts would undoubtedly have allowed the said judgment against said Jane Hicks Brown to be impeached. We also think that all decisions of State courts allowing judgments from other States to be impeached collaterally, and by extrinsic evidence, are applicable to this case. It is now settled beyond all controversy that judgments from sister States, wherever they can be used, are entitled to the same faith and credit as domestic judgments. That is, although an execution cannot be issued upon them directly, nor are they liens upon real estate directly, yet when they are sought to be used as evidence, or as the foundation for other actions, they are entitled to the same faith and credit as domestic judgments. Now, as nearly all courts hold that judgments from sister States may be impeached collaterally for want of jurisdiction, and by extrinsic evidence, it is substantially a holding that domestic judgments may also be impeached under like circumstances. Proceedings instituted for the purpose of destroying, impairing, or modifying the force or effect of a judgment for all cases, such as proceedings to reverse, vacate, set aside, declare void, suspend, modify, or perpetually enjoin a judgment, are direct proceedings. But a proceeding instituted for some other purpose, and in which the question of the force or effect of the judgment arises only incidentally, is a collateral proceeding. A judgment rendered with jurisdiction can never be impeached in a collateral proceeding; but a judgment rendered without jurisdiction may. In fact, a judgment rendered without jurisdiction is no judgment at all. A judgment cannot be rendered against any person until he has had his day in court, and until he has had an op-

portunity to be heard. To say that the record of a judgment can conclusively prove that any person was a party to the action in which it was rendered, and then to say that the judgment is conclusively valid because he was a party, is to reason illogically. It is begging the question. It is reasoning in a circle. That is, the judgment proves that he was a party, and being a party, proves the validity of the judgment. There was no finding in this case by the court rendering the judgment that said Jane Hicks Brown was served with notice, or that she was in fact a party to the suit; but even a finding to that effect could not make any difference, for a court cannot make a finding against a person until after the court has obtained jurisdiction of such person.

In an action in the nature of ejectment, such as the present action is, the validity of a judgment under which either party claims title, is just as much in issue as the validity of any judgment in any action can be. But there is this difference: in the most of actions, where the validity of a judgment is put in issue, the pleadings must specifically show the issue. But in ejectment this is not necessary. In ejectment all that is necessary for the plaintiff to do is to allege in his pleading "that he has a legal or equitable estate" in the land in controversy, describing the same, and that he "is entitled to the possession thereof;" while all that is necessary for the defendant to do is simply to deny the plaintiff's allegations. And then every thing is in issue that will sustain either title or defeat either title; and each side is bound to take notice thereof. Every thing is in issue as much as though it was set out in the pleadings in the most elaborate detail, and with the greatest circumstantial particularity. Probably no action, except one to reverse, vacate, modify, suspend, or perpetually enjoin a judgment, can be said to be a direct attack upon such judgment. And if not, then ejectment cannot be a direct attack upon any judgment. But where the validity of a judgment is in issue in ejectment, the attack upon the judgment is as direct as it can be in any other action, except an action to reverse, vacate, modify, suspend or perpetually enjoin the judgment, and the parties are in law and by the nature of the action bound to take notice of this attack just as much as they would in any other action.

The judgment of the court below will be affirmed.

HORTON, C. J. I concur in the foregoing opinion, but as the

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question is one of very grave importance, I wish to add, that while it is not to be denied there are numerous decisions of most respectable courts sustaining another rule, in my judgment the conflicting decisions are based upon insufficient and unsatisfactory reasons. The prior decisions of this court have settled the law in this State to be that an officer's return of service on original process may be impeached in a direct proceeding *before* and *after* judgment, where the return states facts (as in this case) which do not come within the personal knowledge of the officer. *Bond v. Wilson*, 8 Kans. 229; *Chambers v. Bridge Manufactory*, 16 id. 270; *Hanson v. Wolcott*, 19 id. 207. The new question now involved is, whether this principle shall be applied in actions in the nature of ejectment, where the plaintiff seeks to sustain his title by a sheriff's deed based upon a judgment rendered by a justice of the peace on default, when there was in fact (notwithstanding the return of the officer) no service of summons, nor any waiver thereof. The ablest of the opinions, holding adverse views, concede they violate all principles of natural justice, but attempt to fortify their forced conclusions on the plea of public policy. Now, in this State, it is unnecessary for a plaintiff, in an action to recover the possession of real property, to allege how his estate or ownership is derived. All he need do is to state and prove he has a legal or equitable estate in the property sued for. Likewise, the defendant can plead or set forth his defense in as general terms. He need only deny generally the plaintiff's title; and without allegations or notice of fraud in the execution of the contract, deed, or conveyance on which the plaintiff relies, the defendant may offer evidence under his answer, and surprise and successfully destroy the title. Even tax deeds, valid upon their face, may be attacked and impeached by evidence *aliunde*, without the pleadings pointing out any defect. In a word, under a general denial, we have already held, that in actions of this nature the defendant may show, by any legal evidence which he may have, that he is the owner of the land in controversy. *Hall's Heirs v. Dodge*, 18 Kans. 277. If our Code has authorized, upon pleadings of such general terms, evidence of so broad a quality to be presented, I see no reason to deny the right to impeach in this suit a judgment of the character that Bartlett obtained against Jane Hicks Brown before a justice of the peace in 1860. The fact that it is *prima facie* and presumptive evidence of its truth is a sufficient advantage to the plaintiff rest-

ing upon it; and the party affected thereby, having no notice by the pleadings that it would be used to sustain any issue, would be, it seems to me, more greatly prejudiced by a denial of the right to controvert and disprove it, than the plaintiff would be if called upon to sustain the jurisdiction of the justice when that jurisdiction is attacked with the proof that Jane Hicks Brown was not within the State at the time of the pretended service. I see no valid reason for placing a defendant under this disadvantage against a judgment thus obtained. The fairness and the justice seem in favor of the right to impeach and annul the judgment.

Under the Federal statutes, the plaintiff being a citizen of another State, and the defendants citizens of Kansas, either party could have removed the suit before trial to the United States Circuit Court for this district. If the defendants had taken advantage of this statute authorizing such removals, under the decisions of the Federal courts it seems to be settled that the pretended judgment could have been successfully impeached by the defendants in that court. *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. Gas-light & Coke Co.*, 19 id. 58; *Earle v. McVeigh*, 1 Otto (U. S.), 503; *Shelton v. Tiffin*, 6 How. 163; *Webster v. Reid*, 11 id. 437; *Elliott v. Peirsol*, 1 Pet. 328. See, also, *Pennoyer v. Neff*, 95 U. S. 714.

If we now hold that the defendants cannot obtain the same rights under our practice in our own courts, as in the Federal courts held in the State, or if we remit the defendants to other modes of redress than awarded them in the District Court, we deprive our own courts of some authority and power, and restrict their procedure upon grounds of policy unknown to Federal practice. We would thus tend to swell the litigation in the Federal courts, whose extensive and encroaching jurisdiction is already a subject of complaint with some of the profession, and is viewed by many as perilous, not only the importance, but the existence of our State courts. In my view, not only do the principles of natural justice, but likewise the true principles of policy, considering the provisions of our Civil Code and the prior decisions of this court, sustain the opinion of my learned brother.

BREWER, J., dissented.

WESTERN UNION TELEGRAPH CO. v. RICH.

(19 Kans 517)

Easement — railroad right of way — telegraph line.

In order to construct a telegraph line along its route for its own use, a railroad company may cut down trees standing on its way, without incurring any additional liability to the original owner of the land for compensation; and if such telegraph line is constructed by the railroad company and another for their joint use, the latter, and the latter alone, is liable to such landowner for the additional damage to the land by the use of the telegraph line.*

TRESPASS. The opinion states the facts. Judgment for plaintiff, and defendant brought error.

Ross Burns and *J. J. Waters*, for plaintiff in error.

Randolph & Sedgwick, for defendant in error.

BREWER, J. Rich sued the telegraph company in the Lyon county District Court to recover \$435, treble the value of trees and vines belonging to Rich and on his land, and alleged to have been cut down and destroyed by the agents and employees of the telegraph company. There was a trial by jury, and a verdict returned of \$270, which judgment the telegraph company asks to be reviewed.

[A question of practice omitted.]

It appears that the trees were on or close by the right of way of the A. T. & S. F. Railroad, and were cut down to make room for some telegraph poles and prevent interference with the telegraph wire. This line of telegraph was, it was claimed by plaintiff, built and owned by the defendant, and the trees cut down by its employees. On the other hand the defendant sought to prove that it was built by the defendant and the railroad company, under an arrangement for its joint use by the two companies. A witness was called, and the defendant offered to prove by him that the line of telegraph was built jointly by defendant and the railroad com-

*See *Southwestern R. R. Co. v. Southern, etc., Telegraph Co.* (46 Ga. 43), 13 Am. Rep. 285.

pany for the use of the railroad company in the moving of its trains, and the transaction of its business, that it was a part of and necessary to its business, and was built upon and over the right of way of the railroad company; but the court refused to receive the testimony, and the defendant excepted. In this we think the court erred. A telegraph line, if not indispensable to a railroad, tends so much to facilitate its business, and to the speedy and safe running of its trains, that the railroad company has a right to build it, to use its right of way therefor, and to remove all obstructions thereon, to its fullest and most uninterrupted and beneficial use. Although it may have but an easement in the land, and that easement limited to its use for railroad purposes, yet a telegraph is so convenient if not indispensable, that it may cut down every tree and bush on the right of way if necessary for the most constant and efficient use of a telegraph line built by it over and upon such right of way, just as it may dig away a hill, or fill up a ravine, for the sake of a water tank or a station-house. *St. Jos. & D. C. Railroad Co. v. Dryden*, 11 Kans. 186. By so doing it gives the adjacent land-owner no claim for damages. Such use is contemplated in the original condemnation, and the damages resulting therefrom are part of the damages included in the assessment therefor. In short, the railroad company may use its right of way not merely for its track, but for any other building or erection which reasonably tends to facilitate its business of transporting freight and passengers, and by such use in no manner transcends the purposes and extent of the easement, or exposes itself to any claim for additional damages to the original land-owner. So that if the railroad company had built this line by itself, and independent of the defendant, and in so doing had only cut down trees upon its right of way, it is clear that the plaintiff would have had no cause of action therefor. Does the fact, that it took a partner in the construction and use of the telegraph, expose it or such partner to any liability to the land-owner for the full value of trees cut down upon its right of way? We think not. If the railroad company could build by itself without liability, it did not assume liability by building with another. Whatever it could do and would have done for its own use and benefit, and was so done, was, so far as the land-owner is concerned, *damnum absque injuria*, no matter who bore the expense; or perhaps more correctly, it was damages already paid for. We do not question that every additional

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burden cast upon the land outside of the purpose and scope of the original easement, no matter in whose behalf, gives to the land-owner new claim for compensation. But such compensation is limited to the extent of the additional burden. *Hatch v. C. & I. Railroad Co.*, 18 Ohio St. 92; *L. M. & C. Railroad Co. v. Dayton*, 23 id. 510; *State v. Maine*, 27 Conn. 641. Of course, if the trees were not upon the right of way, it is immaterial whether the defendant built the line alone or jointly with the railroad company, for in the latter case either would be responsible for the entire damages. We cannot of course pass upon this question of fact, for we cannot tell what the testimony, if admitted, would have disclosed. It is enough that the testimony offered ought to have been admitted, and then the jury instructed that, if the facts were as defendant sought to prove them to be, the defendant was liable for only the damages caused by the additional burden, if any, its use of the telegraph cast upon the land.

The judgment will be reversed, and the case remanded for a new trial.

All the justices concurring.

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(19 Kans. 373.)

Jurisdiction — administrator's sale of real estate — notice to heirs.

Proceedings for the sale of real estate by an administrator are not proceedings *in rem*, and notice to the heirs is essential to jurisdiction.

A recital in a judgment of "due service" of a notice cannot prevail against evidence furnished by the same record that the notice was not duly served.

EJECTMENT. The defendant claimed under an administrator's sale, and had judgment, and the plaintiff brought error. The opinion discloses the facts.

Gillett & Forde, for plaintiff.

Ruggles, Scott & Lynn, for defendants.

BREWSTER, J. The question in this case is, as to the validity of
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an administrator's sale. Its validity is challenged on two grounds: 1st, the insufficiency of the petition for the sale of the real estate; and 2d, the invalidity of the notice given of the application for order of sale. Passing by the first, we shall notice the second ground of attack. And here it may be remarked, that as these proceedings are attacked collaterally, a want of jurisdiction must be shown, and no mere matters of error are sufficient to invalidate the sale. This is conceded by counsel. Now as to the notice. Section 131 of the administrator's act of 1859 (Comp. Laws 1862, p. 531), provides, that "when such petition (that is, the petition for the sale), and such accounts, lists, and inventories shall be filed, the court shall order that all persons interested in the estate be notified thereof, and unless the contrary be shown on the first day of the *next term* of the court, an order will be made for the sale," etc. "Such notice shall be published for six weeks," etc., "or by ten handbills," etc., "*in the discretion of the probate court.*" On the records of the probate court appears this entry:

"IN PROBATE COURT OF LYON COUNTY, *January 2d, 1866, January Term.*

"In the matter of the estate of Zilpha A. Mickel, deceased, Wm. H. Mickel administrator.

"Now comes said administrator, by William T. Galliher, and files petition asking for an order to sell the real estate of said deceased to pay the debts of said estate. In consideration whereof, *it is ordered*, that all persons interested in said estate be notified by publication *six weeks in the Emporia News*," etc.; "that unless the contrary be shown on the first Monday in February of this term of court, an order will be made," etc.

And on 5th February, 1866, appears the following:

"Now comes the said administrator, and the petition for the sale of real estate of deceased to pay debts being for hearing, and no cause being shown why said petition should not be granted, after *due notice* of the proceedings thereof *given by publication*," etc., "and it appearing to the court that there is not sufficient personal property to pay the debts," etc., "a sale is ordered."

So that this notice was ordered by the court on the 2d of January, 1866, at the January term, to be published in the *Emporia News* for six weeks, that unless the contrary appeared on the first Monday of February of the *same* term of court, the order for sale

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would be granted, etc. The first Monday of February was the 5th, and the day when the order of sale was made to the administrator, and under which he made this sale. Upon this counsel argue, that the statute required that the notice, if published, should be for six weeks, if by handbills they should be put up twenty days before the term at which the petition was to be presented, and it authorized the probate court in its discretion to cause notice to be given in either manner. The probate court exercised that discretion by ordering the publication in the *Emporia News* for six weeks. Having exercised that discretion, notice could be given only in the manner ordered, and the notice ordered was insufficient for two reasons: 1st, it was an impossibility for notice to be published for six weeks between January 2d and February 5th, less than five weeks of time actually intervening; and, 2d, the notice was of an application to be made at the *same* when it should have been at the *next* term. (Probate courts then as now held but four regular terms annually, commencing on the first Mondays of January, April, July, and October respectively.) To this it is replied, that very likely there is a mistake in the date of this order of publication — either that the journal entry was made under a wrong heading, or that the order was in fact made several days before it was entered — and the language of the entry is referred to as evidence of this, for it reads, “Now comes said administrator * * * and *files* petition;” and the indorsement on the back of the petition, as well as entries on another docket, show that the petition was filed on the 9th of December prior. But aside from the rule, that we must take the record as it is, rather than as we think it ought to be, the language of the order is conclusive against any such mistake. It reads, “first Monday in February of *this* term.” And as the term commenced January 1st, and the order appears of date January 2d, it could not have been made but one day earlier, and “*this* term” been applicable. Again it is said, that as the petition was filed December 9th, publication of notice may have commenced immediately; that ample time intervened between the filing of the petition and the order of sale for publication in either manner authorized by the statute; that on February 5th the probate court found that such publication had actually been made, and approved it, and that this subsequent approval is equivalent to a prior order, and that the recital in the order of “due notice” is a judicial finding, and *prima facie* evidence of such due notice,

and, as the notice itself and proof of publication are gone, conclusive evidence thereof. With this view the order of January 2d may be entirely disregarded, and jurisdiction sustained upon the finding of "due notice," and the time of filing the petition. To this it is replied, that a finding of due notice, if a general finding, as this is, is always limited by and construed as referring to the actual notice found in the record; that no notice could be given in either manner until the court had first determined which should be pursued; that it did so determine, and that although the notice itself may be gone, yet it must be presumed to have started from and been controlled by the only order in reference thereto found in the record.

The question is not free from difficulty, and the members of this court do not agree in their views. The writer of this opinion is inclined to regard with favor the first of the above lines of argument, and to consider the order of sale as beyond successful attack, while the other members of the court yield their assent to the propositions last stated, and hold the order made without due notice, and therefore void. It is essential to jurisdiction of the person that there be notice. A finding of notice is at best but *prima facie* evidence of notice. If an attempt at notice appears in the record, the finding, if a general one, refers to and is limited by such attempted notice. If that be fatally defective, there is no presumption of notice in other or better way. Where the court determines what kind of notice must be given, no right to give any notice exists until the court has made its determination. A determination of that kind does not relate back, so as to ratify unauthorized acts of notice. There is in the entry in this case directing notice nothing in terms or effect like *nunc pro tunc* order. It operates only in the future; it purports to be only for the future. A notice, without an order prescribing the manner thereof, has no force. If there be an order, a notice must follow the order; and if the order prescribe an impossible or illegal notice, neither order nor notice is of any force, and though the notice be gone the order proves the invalidity of both. Tried by these propositions, the court is of the opinion that the order of sale was made without any proper service of notice, and is therefore void. *Valle v. Fleming*, 19 Mo. 454; *Sibley v. Waffle*, 16 N. Y. 180.

But we are met by the further claim that these proceedings for the sale of the real estate of decedents are proceedings *in rem*, and

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that therefore so far as any question of jurisdiction is concerned it is immaterial whether sufficient or indeed any notice was given; that the provision requiring notice is directory, and that no defect therein affects the jurisdiction. Are these proceedings for the sale of the real estate of decedents proceedings *in rem*? An examination of the authorities discloses a wonderful disagreement. See, among many, the following, holding that they are: *Grignon's Lessee v. Astor*, 2 How. (U. S.) 319; *Mohr v. Manierre*, 9 Chicago Legal News, 270; *Sheldon v. Newton*, 3 Ohio St. 494, containing a strong argument by RANNEY, J.; *Benson v. Cilley*, 8 Ohio St. 604. And these, the contrary: *Gibbs v. Shaw*, 17 Wis. 197; *Good v. Norley*, 28 Iowa, 188, opinion by BROW, J.; *Morris v. Hogle*, 37 Ill. 150; *Sibley v. Waffle*, 16 N. Y. 180. The argument in favor of the affirmative is in brief, that the administrator represents the estate, and has its property in his possession; that when the court appoints him it gives him possession and charge of all of decedent's property; that it is optional with the legislature to provide for the sale of the personal or the real estate first; that in certain instances it has authorized the prior sale of the real estate (Comp. Laws, 531; § 133); that a sale of the personal estate is made without notice of an application for an order, and even without any order, and that the same provision might have been made for the sale of the real estate; and that as the administrator has possession of the real estate as of other property, notice to other parties when required is to be regarded as directory, but as in no manner affecting the jurisdiction of the court in ordering the administrator to sell the property he has in his possession. On the other hand it is said that the administrator has no possession of the real estate except when specially ordered by the court; that the title and possession, and right of possession, pass immediately to the heirs, subject to be divested only by the special order directing a lease, or sale; that as the heirs have the title, the possession, and right of possession, a proceeding to divest them of these must in the nature of things be adversary; that it is of ancient law that the title and possession of real estate passes to the heir, of personal to the executor or administrator; that an order to the latter to sell personal property may well be a proceeding *in rem*, as it is an order for the sale of that of which he has both the legal title and the possession, while an order to him to sell real estate, of which he has neither title nor possession, must in the nature of things be, as

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to those holding both title and possession, adversary. We do not care to enter into any lengthy discussion of this question, which has been so fully discussed in the cases we have cited, as well as in many others. We shall content ourselves with expressing our adherence to the views of those courts which hold the proceeding adversary, so far as the heirs are concerned, and notice to them jurisdictional. Briefly, we may say that the title and possession of real estate pass immediately to the heirs; that it is not sold as of course but only when necessary to pay debts; that until the fact is judicially established, the heirs may not be divested of their title, and before one is divested of title to property he ought to have his day in court; that the appointment of an administrator does not bring the heir into court; that he must be brought in, if brought in at all by special notice; that as the heir ought to have notice, the legislature has required notice; and that a requirement so wise and just ought not to be weakened or annulled by judicial construction. Further, we may add that the waste of estate in settlements is proverbial, and that provisions checking hasty sales, and requiring notice to parties interested, tend to diminish the waste, and their salutary effect ought not to be destroyed. While therefore judicial sales ought to be upheld as against any mere errors, yet it is not too much to require purchasers at such sales to examine the records so far as to see that the adverse parties received proper notice of the proceedings, and had therefore the opportunity to contest them.

For the error above indicated, and without pursuing this discussion further, the judgment of the District Court must be reversed, and the case remanded for a new trial.

All the justices concurring.

Judgment reversed.

DOOLITTLE V. FERRY.

(30 Kans. 280.)

Negotiable paper — indorsement — parol evidence to vary effect of.

Parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement without recourse.*

* See *Charles v. Denis* (42 Wis. 56), 24 Am. Rep. 383; *contra*, *Ross v. Espy* (66 Penn. St. 431), 5 Am. Rep. 394; and compare, *Downer v. Cheesbrough* (36 Conn. 39), 4 Am. Rep. 22.

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ACTION against indorser of a promissory note. On the trial evidence was admitted under objection of a parol agreement that the indorsement was without recourse and simply to transfer title. The jury were charged that if they found such to be the fact they should find for defendant. Verdict for the defendant.

Gillett & Forde, for plaintiff.

Sterry & Sedgwick, for defendants.

BREWER, J. The defendants were the payees of a negotiable note, and transferred the same to plaintiff in error, by an indorsement in these words: "*Pay to J. S. Doolittle.—FERRY & WATSON.*" And the important question is, whether testimony is competent to show a parol contract, contemporaneous with said indorsement, that the indorsers should under no event become liable to the indorsee in consequence of said indorsement, and that the same should be operative simply to transfer the title to the paper. That from such indorsement the law implies a well-defined contract, and that such contract casts a conditional liability on the indorser is conceded. And that such implied contract is conclusive as between remote parties to the note without notice of any different express contract is clear. But the difficult question is, whether as between the immediate parties the implied contract is to be treated as a written agreement which cannot be overthrown by parol testimony. If the contract which the law implies is in fact written out above the signature of the indorser, no one doubts that it is conclusive. Is that which is implied equally conclusive? In 2 Pars. on Notes and Bills, 23, the author says:

"The exact question is this: Suppose over an indorsement an agreement is written out in full, setting forth exactly the same promises which the law implies from a blank indorsement; suppose further, that in an action by the indorsee upon this indorsement, evidence was offered by either party which was inadmissible on the ground that it varied a written agreement, would the same evidence be inadmissible in the same action, if the indorsement were in blank? We are strongly disposed to say that it would be so, as a general rule, and to consider those cases in which such evidence would seem to be admissible as exceptions."

With the principle thus enunciated we concur. The contract

which the law implies is of the same force as though it were reduced to writing, and can be limited or impeached by only the same kind of testimony. It would be folly to assert that the authorities are all in harmony, and that the cases in which testimony of a parol agreement has been admitted to vary the effect of an indorsement can all be reconciled as mere exceptions to and not in conflict with this rule. But the rule itself is well supported by authority, and seems to us resting upon sound foundations, and conducive to the stability and value of negotiable paper. The law gives to an indorsement a two-fold force. It operates to transfer title; it is the assumption of a conditional liability. If an absolute liability is desired, apt words are well known and in common use. A waiver of notice and protest, written above the indorsement, will make the liability certain — the liability of a surety, it may be, but still a fixed and certain liability on the instrument. If a transfer of title without assumption of liability is sought, equally apt and well-known words are at hand. "Without recourse," relieves the indorser. Where the law furnishes such apt, brief and well-known expressions for making the indorsement accomplish exactly what the parties may desire, wise policy demands that each form of indorsement should conclusively carry with it the liability which it implies. There are no instruments concerning which it is more important that the rules should be clear, settled and conclusive, than negotiable paper. Such paper subserves an invaluable purpose in business transactions, and should tell upon its face the whole story of its obligations. Where for convenience, and to facilitate business, certain short forms and expressions are used, to which the law has attached certain implications, those implications should be as conclusive upon all the parties as though the full contract were reduced to writing. In a note by Judge REDFIELD to the case of *Dale v. Gear*, to which we shall refer hereafter, 12 Am. Law. Reg. (N. S.) 23, it is said :

"The abstract question, whether the legal intendment of a contract or instrument is any more open to explanation by oral proof, than the very language used, is one which can properly admit of no doubt. The legal or natural implications, attendant upon the use of a term, as as much a part of the 'language' of a contract or instrument, as are the more direct and explicit meanings attached to the words."

In 1 Daniels on Negotiable Instruments, 533, the author says :

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"But when it appears from an inspection of the paper that the party is an indorser, there seems to us no just ground for the distinction taken between the implied contracts arising from his mere name thereon written, and contracts written out *in extenso*. The indorsement seldom consists of any thing more than the indorser's signature ; but if the agreement imported by that signature were written over it in full, the undertaking of the indorser would not be more clearly defined than it is by the signature itself. Its presence and position upon the instrument are as plain a manifestation of the intention of the party as if it were set forth in express words and parol evidence should not be admitted to vary or contradict it."

And again, on the succeeding page, after noticing the fact that an indorsement is in effect the drawing of a new bill, he adds : "The following general rule may therefore be stated, to wit : *that in an action by an immediate indorsee against an indorser, no evidence is admissible that would not be admissible in a suit by a party in privity with the drawer against him.*"

And again : "Accordingly, the indorser cannot show against his indorsee that it was agreed that he should not be liable, and that his indorsement was without recourse on him."

The case of *Dale v. Gear*, 38 Conn. 15 ; 9 Am. Rep. 353, is a very strong, clear case in point, in which the court in reply to the claim that as between the indorser and indorsee parol testimony was admissible, uses this language : "But the answer must be, that the contract of indorsement is implied by law as clearly and perfectly from the blank indorsement of a negotiable note, irrespective of any contingency of negotiation, as if written out in full when indorsed." In that case, as well as in Daniel's treatise, some three or four limitations or exceptions are noticed, as, where the indorsement was without consideration — or, upon trust for some special purpose, as for collection merely — or, where there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance on the responsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and where the attempt to enforce it would be a fraud. It is unnecessary in this case to inquire whether these limitations and exceptions are justly recognized, for while counsel for defendants in error claim that the allegations of their answer bring the case within the last exception,

we fail to see any thing in it beyond a mere claim of an agreement that they were not to be held liable on their indorsement. And in respect to their answer, we cannot do better than quote the language of the court in *Dale v. Gear*, *supra*: "But this plea shows no agency, trust, equitable relation, or equity connected with an antecedent transaction constituting a consideration for the agreement, or which would justify a court of equity in interfering to prevent an enforcement of the contract of warranty which the law implies. It presents a naked case of an attempt to prove, by parol, that a clear and unambiguous contract of warranty is not such, and to contradict it in terms — to turn an indorsement *without restriction*, before maturity, into a *restricted indorsement*. Such a plea cannot be sustained without a violation of essential principles." See, also, as authorities: 1 Greenl. on Ev., § 276, note 2; *Lee v. Pile*, 37 Ind. 107; *Wilson v. Black*, 6 Blackf. 509; *Bartlett v. Lee*, 33 Ga. 491; *Woodward v. Foster*, 18 Gratt. 205; *Bank of Albion v. Smith*, 27 Barb. 489; *Fassin v. Hubbard*, 55 N. Y. 465; *U. S. Bank v. Dunn*, 6 Pet. 51; *Howe v. Merrill*, 5 Cush. 80; *Prescott Bank v. Caverly*, 7 Gray, 217; *Wright v. Morse*, 9 id. 337; *Bigelow v. Colton*, 13 id. 310; *Goupy v. Harden*, 7 Taunt. 159. The case of *Davis v. Brown*, 4 Otto, 423, does not conflict with the views herein expressed, for there the evidence was of a cotemporaneous written agreement.

For the error in the ruling of the court in this respect, the judgment must be reversed, and the case remanded for a new trial. We think it probably unnecessary to consider the other errors alleged, and therefore content ourselves with the decision of this question.

All the justices concurring.

COMMISSIONERS OF SALINE CO. V. ANDERSON.

(30 Kans. 303.)

Officer de facto — payment of salary to, by county

County commissioners paid to the county clerk *de facto*, claiming *de jure*, the salary of his office. The title to the office was then in litigation to the knowledge of the commissioners, and the clerk *de facto* was insolvent. *Held*, that the clerk *de jure*, whose title was affirmed, had no cause of action for such salary.*

ACTION by a county clerk for a salary. The opinion states the facts. The plaintiff had judgment.

John Foster, county attorney, for plaintiff in error.

C. A. Hiller, for defendant in error.

VALENTINE, J. This was an action brought by John Anderson against the Board of County Commissioners of Saline county, for \$900, claimed to be due as salary as county clerk from January 10th to October 10th, 1876. Judgment was rendered in favor of the plaintiff and against the defendant for \$549.28, and the defendant now brings the case to this court for review. The facts of the case, so far as it is necessary to state them, are substantially as follows: At the general election held in November, 1875, John Anderson and Fred. H. Wildman were opposing candidates for the office of county clerk in and for said county. Anderson received a majority of all the votes cast, and the canvassers awarded to him the certificate of election. Great irregularities, however, occurred in holding said election, and for this reason Wildman contested the same. The contest court decided in favor of Wildman, awarding to him the certificate and annulling the certificate previously issued to Anderson. The certificate to Wildman was issued January 10, 1876. Wildman immediately qualified and took possession of the office. Anderson then took the case to the District Court on petition in error, where the judg-

* See *Dolan v. Mayor* (68 N. Y. 274), 23 Am. Rep. 163; *Matthews v. Supervisors* (53 Miss. 715), 24 Am. Rep. 715; *People v. Miller* (24 Mich. 458), 2 Am. Rep. 131; *Mayfield v. Moore* (68 Ill. 428), 5 Am. Rep. 52; *Auditor v. Benoit* (20 Mich. 176), 4 Am. Rep. 332.

ment of the contest court was reversed, and the office awarded to Anderson. Wildman then brought the case to the Supreme Court on petition in error, where the judgment of the District Court was affirmed, December 5, 1876. *Wildman v. Anderson*, 17 Kans. 344. Wildman in the meantime held said office, and received the salary and fees from said 10th January, 1876, up to October 10th. But as soon as the case was decided in the Supreme Court, he delivered the office up to Anderson. The county commissioners had during all this time full knowledge of all these proceedings, but nevertheless paid said salary to Wildman as aforesaid. Wildman was and is insolvent; but whether the county commissioners were aware of this fact, we think the record does not show. There are some other facts in the case, but we do not think that it is necessary to state them. Upon the foregoing facts the following question arises: Are the county commissioners, as representatives of the county, liable to Anderson for the salary which they have already paid to Wildman? We think they are not. *Benoit v. Auditors of Wayne County*, 20 Mich. 176; *Smith v. Mayor of N. Y.*, 37 N. Y. 518; *Conner v. Mayor of N. Y.*, 5 id. 285; *Parker v. Supervisors*, 4 Minn. 59; *McAffee v. Russell*, 29 Miss. 84, 97; *Wheatly v. City of Covington*, 11 Bush, 18, 22; *The Queen v. Mayor of Cambridge*, 12 Ad. & El. 702. It is held otherwise in California. *People ex rel. Dorsey v. Smyth*, 28 Cal. 21; *Carroll v. Siebenthaler*, 37 id. 193. But Chief Justice CAMPBELL of Michigan says, in the Michigan case (page 183), that "the California authority (*Dorsey v. Smyth*, 28 Cal. 21) is based entirely upon New York cases which are not law in the latter State, and which were made in disregard of the previous decision in *Conner's case*. It has no reasoning of its own and does not seem warranted by principle." The decision in the other California case, that of *Carroll v. Siebenthaler*, is founded upon that of the previous case of *Dorsey v. Smyth*.

But returning to the case at bar, Wildman was an officer *de facto*. He held the office under *color of title*. He took possession of the same in good faith, under a certificate of election duly issued, under a judgment of a court duly rendered, under a judgment of a court of competent jurisdiction, and a judgment that was not finally overthrown until December 5, 1876, when the decision of the Supreme Court was rendered, which was long after the 10th of October, 1876—up to which time only Wildman received said salary. Such an officer, as Wildman was, may hold the office

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and perform all the duties thereof pending any litigation concerning the same. *The State v. Durkee*, 12 Kana. 308, 314; *Leach v. Cassidy*, 23 Ind. 449. And all his acts connected with the office will be valid so far as the public and third persons are concerned, unless they are void for some other reason than merely that he is only an officer *de facto*. This last proposition is so nearly axiomatic that it needs no citation of authorities to sustain it. As Chief Justice CAMPBELL says, in the Michigan case (p. 181), "The doctrine of the validity of the acts of officers *de facto* has been carried as far as possible. In *The State v. Williams*, 5 Wis. 308, it was held to make good the approval of a statute by a governor usurping that office. In *Venable v. Curd*, 2 Head (Tenn.), 582, it was carried to the questionable extent of making good the action of a court under an invalid statute. In *Doty v. Gorham*, 5 Pick. 487, where an officer *de facto* had made a sale, it was held that in a suit against himself, with others, for removing property thus sold, he could justify under the sale. In *Leach v. Cassidy*, 23 Ind. 449, it was held that a school officer *de facto* could not have his title questioned in an application made by him for a *mandamus* to compel the payment to him of school moneys by local officers. In *Desmond v. McCarthy*, 17 Iowa, 525, it was held that in a replevin by an officer *de facto*, to recover the papers belonging to his office, which had been withheld on a claim that he was not the lawful officer, his title could not be questioned, but that the only inquiry on that must be in proceedings to oust him." See, also, *Hunter v. Ferguson*, 13 Kana. 463, 475; *Rheinhardt v. The State*, 14 id. 318; *Higby v. Ayers*, id. 331, 338.

Now as Wildman was an officer *de facto*, holding under color of title, every person had a right to recognize him as a legal and valid officer, and to treat him as such. The public, the county, the county commissioners, and private individuals, had a right to do business with him as an officer, and to pay him for his services, if they chose, without taking any risk of having to pay for such services a second time. It might be greatly to the interest of the public, or of the individuals doing business with such officer, to pay him when his fees or salary become due; and should they not be allowed to consult the interest of the public and their own interest to so pay him? It is not their fault that he is wrongfully in the possession of the office; and how are they to know whether he is in the possession of the office rightfully or wrongfully? Are they

bound to know who is entitled to the office in advance of any final adjudication of the question by the courts? Are they bound to anticipate the decision of the courts? And are they bound to decide the question for themselves, as it thus comes up incidentally and collaterally in the payment of fees or salary? And if they should determine that the courts would eventually decide against the officer *de facto*, must they refrain from paying him any fees or salary at perhaps a great loss to themselves, or to the public? Judge COOLEY says, in said Michigan case (p. 187), that "The public, who have an interest in the continuous discharge of official duty, and whose necessities cannot wait the slow process of a litigation to try the title, have a right to treat as valid the official acts of the incumbent, with whom alone, under the circumstances, they can transact business. This rule is an obvious and necessary one for the protection of organized society; for, as was said in *Weeks v. Ellis*, 2 Barb. 325, the affairs of society cannot be carried on unless confidence were reposed in the official acts of persons *de facto* in office. And private individuals, in controversies between themselves, are not permitted to question the acts of an officer *de facto*, for the further reason that to do so would be to raise and determine the title to his office in a controversy to which he was not a party, and in which he could not be heard." Now, the interest of the public in the "*continuous discharge*" of official duties would authorize the payment of the legal fees or salary for the performance of such official duties to the person performing the same; and to allow a person not in the possession of the office, but who claims to be entitled thereto, to sue for the fees or salary thereof, would be to allow the question of the title to the office to be raised and determined against the officer *de facto* "in a controversy in which he was not a party, and in which he could not be heard." Such certainly could not be allowed. But if this suit can be maintained, then it would be allowed. The salary of a county clerk is payable quarterly (Laws of 1875, p. 137, § 5); and if Anderson can maintain this action, then he could have maintained an action against the county commissioners for the first quarter's salary on and at any time after April 10, 1876, for it was due then, although Wildman was still in the possession of the office, and although his title to the office had not yet been finally adjudicated, but was still pending in the courts. It may be that Wildman could not have recovered the salary in an action brought by himself (though upon

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this question we do not wish to express any opinion); for it may be, that as between himself and others, where he has to rely upon his own title to the office, the question of his title could be raised, and his title held to be void; though upon this question we express no opinion.* But that is not this case. He is not suing for his salary in this case. He is not a party to this suit, nor has he any interest therein. The question of his title to the office arises between third parties in this case—between Anderson and the county; and does not arise but only incidentally and collaterally. We do not think that the question can be raised and litigated between such parties and in such a manner. It must be remembered that Wildman was not a mere usurper; but he was an officer *de facto*, having possession of the office under color of title. What would be the rule if he were a mere usurper it is not necessary for us to decide in this case. All that we now decide is, that where a person is in possession of the office of county clerk, under color of title, and is the county clerk *de facto*, and claims to be the county clerk *de jure*, and the board of county commissioners pays to him the salary due to the rightful incumbent of such office, the county clerk *de jure* has no action against the county board for such salary, and this, notwithstanding the fact that the county board may have known at the time they paid said salary that the question as to the title to the office was in litigation, and notwithstanding the fact that the county clerk *de facto* may be insolvent. The remedy of the county clerk *de jure* in such a case is an action against the county clerk *de facto*.

The judgment of the court below will be reversed, and the cause remanded with the order, that judgment be rendered in favor of the defendant below, and against the plaintiff below, for costs.

All the justices concurring.

Judgment reversed.

CENTRAL BRANCH RAILROAD COMPANY V. FRITZ.

(30 Kans. 430.)

Fixtures—dwelling-house, when personality.

A and B made a contract, by which A sold to B a lot of land, and B was to enter into possession and build a dwelling-house and make improvements,

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which were all to remain on the land until B should fulfill, and if he should not fulfill, all such improvements should become the property of A. B not having fulfilled, assigned the contract to C, who entered and built a small wooden dwelling-house on low blocks of wood. Afterward C removed the house into the highway, assigning the contract to D, and sold him the house and he removed it to other land of his own, and erected it on a stone foundation. *Held*, that A could maintain replevin for the house against D.

REPLEVIN. The opinion states the facts. The defendant had judgment.

D. Martin and A. S. Everest, for plaintiff.

W. S. Hoaglin, for defendant.

VALENTINE, J. This was an action of replevin, brought by the Central Branch Union Pacific Railroad Company, and Ralph M. Pomeroy, as trustee, etc., against Henry T. Fritz, for the recovery of a house. The case was submitted to the court below upon the pleadings and upon an agreed statement of facts; and upon said pleadings and agreed statement of facts the court below found in favor of the defendant and against the plaintiffs, and rendered judgment accordingly. The principal material facts are as follows: The railroad company owned a certain piece of land, containing eighty acres, more or less. It agreed in writing to sell the same upon certain terms and conditions, to John C. Archer. The principal of said terms and conditions, so far as they have any application to this case, are as follows:

“The first party hereby agrees to sell unto the second party said land for \$952, with interest—the principal to be paid in eight equal annual payments, and the interest to be paid annually in advance. Archer is to take immediate possession of the land, and agrees to improve and cultivate the same; and agrees that no wood shall be cut on the land except for the erection thereupon of buildings and fence, and the necessary purposes of fuel for the family residing thereon, and that all improvements placed upon said premises shall remain thereon, and shall not be removed during the continuance of this contract; and further, that he will make punctual payment of the above sums as each of the same respectively becomes due, and that he will regularly and seasonably pay all such taxes and assessments as may be lawfully imposed on said premises. But in case the second party shall fail to make the

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payments aforesaid, and each of them punctually, and upon the strict terms and times above limited, and likewise to perform and complete all and each of his agreements and stipulations aforesaid, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party, shall become null and void, and all rights and interests hereby created, or then existing in favor of the second party, or derived from him, shall cease and determine, and the right of possession, and all equitable and legal interests in the premises hereby contracted, shall revert to and revest in said first party, without any declaration of forfeiture, or act of re-entry, or any other act by said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or improvements made, as absolutely, fully and perfectly as if this contract had never been made."

This contract was entered into on 22d March, 1872. On November 4, next following, Archer assigned the same, and all his right, title and interest in and to said land, to Samuel C. Hunt. The contract itself contemplated that it might be assigned. Hunt immediately took possession of the land and erected the house in controversy thereon. Said house was a one-story frame building, about 16 by 24 feet in size, and was set upon ten blocks of wood, the highest one being about one foot, so that said house almost touched the ground on one side, and was about one foot from the ground on the other side. Said house was built for and occupied by the said Hunt and his family as a residence on said premises, and the said Hunt and family occupied the same as their residence until about the 1st of September, 1875, at which time he removed said house from said premises, and into the highway adjoining said premises; and three or four days thereafter said Hunt sold said house to the defendant, Henry T. Fritz, for the sum of \$200, for which sum said Fritz gave to Hunt his negotiable promissory note, payable one year after date, with interest, and Hunt at the same time assigned and transferred to Fritz the said written contract originally entered into between said railroad company and Archer. Fritz then removed said house from the highway to and upon his own premises, being the west half of the north-west quarter of section 34, in township 5, of range 16, Jackson county, where the same was placed upon a permanent stone foundation, and was standing, when the same was taken by writ of replevin in this action. No payment was ever made on said land except the first annual in-

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stallment of interest. All the parties had full notice of all the foregoing facts.

That said contract was violated by the failure to make the payments therein stipulated, and also *by the removal of said house from the land on which it was built*, we think must be admitted. And hence it follows from the terms of the contract itself, that all rights held thereunder, by Archer and his assignees, were forfeited to the plaintiff; and hence it also follows, that at the time the defendant purchased said house, and at the time he placed it on a stone foundation on his own premises, it belonged to the plaintiff, and the plaintiff had a right to replevy the same. *Ogden v. Stock*, 34 Ill. 522; *Mills v. Redick*, 1 Neb. 437; *Hartwell v. Kelly*, 117 Mass. 235; *Huebschmann v. McHenry*, 29 Wis. 656; *Sands v. Pfeiffer*, 10 Cal. 258; *Laflin v. Griffiths*, 35 Barb. 58; *Congregational Society v. Fleming*, 11 Iowa, 533; *Davis v. Easley*, 13 Ill. 192. Whether the plaintiff could still replevy the house after it was placed upon a permanent stone foundation upon the defendant's premises, is a more difficult question. In Nebraska, we think it would be held that replevin would lie, and probably also in Massachusetts; *Mills v. Reddick*, and *Hartwell v. Kelley*, *supra*; while in Indiana, it is possible that a different rule would prevail; *Reese v. Jared*, 15 Ind. 142. That is, in Nebraska it would be held, that a mere wrong-doer, by merely placing a house belonging to another upon a *permanent foundation* on his own land, could not thereby so change the character of the property that notwithstanding any objection the owner might make he (the wrong-doer) would nevertheless convert the property from a chattel into real property, and transfer the title thereto from the owner thereof to himself. The decision in Indiana may differ from that in Nebraska, and from that in Massachusetts; but we do not think it goes to the full extent of declaring a contrary doctrine. It does not appear in the Indiana case, that Schmall, the owner of the land, was a mere wrong-doer, although in law he had no right to the house as against the original owner, until after it was placed on a permanent foundation on his own land.

It is true, that whether a thing is to be considered as a part of the realty or not, always depends upon its connection with the soil; but this connection may be slight, as well as strong, remote, as well as near, and constructive, as well as natural or absolute; and the question also depends upon other and various considerations,

as well as attachment to the soil. Thus, keys belonging to a house, mill-stones, etc., belonging to a mill, are parts of the realty, although they may not, for the time being, be near the realty to which they belong. In such cases, the articles in question are constructively attached to the soil. But attachment to the soil is, as we have already suggested, only one of several conditions which help to determine whether a given thing belongs to the realty or not. A thing may be ever so closely and intimately attached to the soil, and may in fact never have had any independent existence, and yet it may not be a part of the realty. Thus, growing crops, and nurseries of young trees, are only chattels, although their roots extend deep into the soil. The question depends upon many considerations; and thus it is particularly so where the article in question was formerly a chattel. Thus, it depends, first, upon the *annexation* of the article in question to the realty; and as this annexation may be actual, or constructive, direct, or remote, firm or loose, and as the article itself may be great or small, ponderous, or light, and strong, or fragile, it depends also very much upon the *ease and convenience* with which the article may be again *separated* from the realty. Second, it depends upon the *right* of the parties to so annex the article; that is, the right of the parties *to so use the article*, and the right of the parties *to so use the realty*; and as there may be various parties interested in the use or ownership of the article, and in the use and ownership of the realty, this right may be very complex and intricate. Third, it depends upon the *intention* of the parties; that is, the intention of the parties making the annexation, the intention of the parties owning and entitled to the use of the article, and the intention of the parties owning and entitled to the use of the realty. Of course, it depends upon the *right* of the various parties to *form* this intention, and their right to *execute* such intention; but this proposition is probably included in the second proposition above stated. Fourth, it also depends upon the adaptability of the article to be used as a part of the realty to which it has been annexed. This is particularly true where the article in question has only a slight connection with the realty, or where it has only a constructive annexation thereto. This question, when a chattel becomes a fixture, and a part of the realty, has always in several of its various aspects been discussed by this court, in the cases of *Evans v. Estes*, 10 Kans. 314, and *Shoemaker v. Simpson*, 16 id. 43; and to these cases we

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would refer. The question whether a given thing is a part of the realty, or not, depends upon so many questions that many of the decisions would seem, to a superficial observer, to be inconsistent and contradictory; and yet nearly all of such decisions may be harmonized. Thus, dry stones, or rails, laid upon another so as to constitute a fence, are held to belong to the realty, although they have no attachment to the soil except that produced by their own weight. It has even been held, in Wisconsin, "that where rails have been placed along the line of an *intended fence* for the purpose of being laid in the fence, though not actually applied to that use, they pass by a deed of the land, there having been a manifest appropriation to the use of the land." *Conklin v. Parsons*, 1 Chandler, 240, 244. It has also been held that rolling-stock belonging to a railroad company is sometimes real property. *Ewell on Fixtures*, 34 *et seq.* It has also been held that a wooden house easily removable, resting upon blocks lying upon the ground, or resting upon a surface without being let into the soil, is nevertheless a part of the realty. *Ogden v. Stock*, 34 Ill. 522; *Huebschmann v. McHenry*, 29 Wis. 655; *Reid v. Kirk*, 12 Rich. (S. C.) 54. On the other hand, it has been held that a stone pier, "firmly imbedded in the earth," was under certain circumstances only personal property. *Wagner v. C. & T. R. Co.*, 22 Ohio St. 563. It has also been held that structures resting on solid foundations, firmly imbedded in the earth, are sometimes only personal property. *King v. Otley*, 1 B. & Ad. 161; *Wansbrough v. Maton*, 4 Ad. & El. 884. Many American cases might also be referred to on this point, among which see *Hartwell v. Kelly*, 117 Mass. 235; *White's Appeal*, 10 Penn. St. 252; *Adams v. Goddard*, 48 Me. 212; *Alexander v. Touhy*, 13 Kans. 64. Even dwelling-houses, resting upon solid and firm foundations, are sometimes not a part of the realty, but only chattels. *Mills v. Reddick*, 1 Neb. 437; *Fuller v. Taber*, 39 Me. 519; *Dame v. Dame*, 38 N. H. 429, and cases there cited; *Van Ness v. Pacard*, 2 Pet. 137; *Osgood v. Howard*, 6 Me. 452; *Adams v. Goddard*, 48 Me. 212. See, also, *Alexander v. Touhy*, 13 Kans. 64; and *Hartwell v. Kelly*, 117 Mass. 235. The question in such cases, as to whether the houses are real property, or only chattels, is determined by many other considerations, as well as annexation to the soil. In some cases it is probable that a thing may be considered both as real estate and as personal property. For instance; suppose the grantor should wrongfully keep

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the keys to the house which he sells, and the grantee should sue him therefor in an action of replevin; the grantee in such a case might probably consider the keys as real estate, for the purpose of giving him a title to them, and as personal property for the purpose of recovering them in replevin. There are certainly many cases in which a party would have the right to elect whether he would consider a certain thing as real estate, or as personal property. All the foregoing remarks have reference to what are usually denominated "fixtures;" that is, articles which were previously chattels, but which have been more or less intimately connected with real estate, and do not have reference to things which were always connected with the real estate.

In the light of the foregoing remarks we may now decide this case. Said house was built in pursuance of said contract. The contract contemplated that a dwelling-house should be built on the land which the railroad company contracted to sell to Archer; that it would be of a permanent character; that it should remain on the land until all the terms and conditions of the contract were complied with and fulfilled; and that if any of the terms or conditions should not be fulfilled, then that the contract should be at an end, and all the improvements made on the land should remain thereon and be the property of the owner of the realty. Said terms and conditions were not fulfilled. The house was removed from the land, which removal was itself a violation of the contract. The house then became personal property (at least, at the election of the plaintiff it became personal property), and belonged to the plaintiff. And the defendant could not then by removing it onto his own land, and placing a stone foundation thereunder, transform the house into real estate, or transfer the title thereto from the plaintiff to himself. We think the house was real estate when it was first built on the plaintiff's land. Its attachment to the soil would not alone and of itself have made it so; but such attachment, taken together with the agreement of the parties, as expressed in their contract, made it so. It became personal property when it was detached from the plaintiff's land. And when it was removed onto the defendant's land, it did not again become real estate; and certainly, not as against the interests and wishes of the plaintiff. At common law, before a chattel could become real estate by its *annexation alone* to real property, it had to be fastened to the real property by some mode more staunch and firm

than the mere strength of its own weight. This has been settled by the two English cases already cited. In the first of such cases it was decided, that where a "mill was of wood, and had a foundation of brick, but the wood-work was not inserted in the brick foundation, but rested upon it by its own weight alone," that the mill was only a chattel. In the second case, it was held that where "a wooden barn" was "erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone," the barn was only a chattel. In these two cases there was nothing but the mere foundations showing that the mill and barn should be considered as real estate; and the court held that they were not sufficient for that purpose. In the present case, there is nothing showing that the house in controversy should be considered as real estate when replevied, except merely the stone foundation, and the defendant's intention; and we do not think they are sufficient. The defendant had no right to place the house upon said stone foundation; nor had he any right to form the intention of making the house real estate. His placing the house upon a stone foundation had no more effect upon the character of the house than if he had placed it upon a stone pavement, or upon the earth itself; for he had no right to place the house upon either. The house and foundation were not built at the same time, as parts and portions of a single whole, but were built separately; and the house, at the time it was placed on said foundation, and afterward, was a movable structure. It is our opinion, therefore, that the house at the election of the plaintiff was personal property at the time it was replevied, and that the plaintiff had a right to replevy it. Of course the plaintiff could have elected to consider it real estate if it had so chosen, but it did not so choose. Whether the defendant ever used this house as a dwelling-house, or indeed whether he ever used it for any purpose, is not shown. His right therefore to it rests merely upon the fact that he placed it upon a stone foundation, intending to make it real property and his own property. Upon this part of the case we do not wish to decide more than is necessary to be decided in the case. Hence all that we decide in this connection is as follows: Where a house, which is a chattel, and belongs to A, is wrongfully removed and placed upon a permanent stone foundation on the land of B, B intending at the time to convert the house into real estate, and to make it his own, and the house is one that can easily

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be removed from the land of B without any substantial injury to either the house or the land, the house does not thereby become a part of the realty belonging to B, but remains merely a chattel belonging to A, and A may recover the same in an action of replevin.

The judgment of the court below will be reversed, and cause remanded with the order, that judgment be rendered in favor of the plaintiff and against the defendant on the agreed statement of facts.

All the justices concurring.

PAPE V. CAPITOL BANK OF TOPEKA.

(30 Kana. 440.)

Banks of discount — power to purchase negotiable paper.

A bank, empowered to discount negotiable notes, has power to purchase such notes.*

FORECLOSURE. The opinion states the facts. The plaintiff had judgment.

W. P. Douthitt and J. D. McFarland, for plaintiffs in error.

N. C. McFarland and J. G. Slonecker, for defendant in error.

BREWER, J. This was an action brought by "The Capitol Bank of Topeka," to recover a personal judgment against Pape and wife, on three promissory notes made by them, and to foreclose a mortgage on lands in Shawnee county, given by them to secure the payment of said notes. The notes are made payable to "James M. Spencer, or bearer," and have written across the back, "Pay to bearer, without recourse on me: James M. Spencer." The mortgage was made to Spencer, and has indorsed thereon an assignment to "The Capitol Bank of Topeka." The notes and mortgage were made at Topeka on 27th June, 1872, and are alleged to have been

*See, *contra*, *Farmers & Mechanics' Bank v. Baldwin* (23 Minn. 193), 23 Am. Rep. 683; *First Nat. Bank of Rochester v. Pierson* (Minn.), 16 Alb. Law Jour. 312, and *Thompson's Nat. Bk. Cas.* 637, and note, 639.

transferred to the defendant in error on 13th March, 1873. The petition also alleges that said bank is a body corporate, duly incorporated under and by virtue of the laws of the State of Kansas, as "The Capitol Bank of Topeka." The defendants answered separately, each interposing several defenses, only two of which are relied on, and they may be briefly stated as follows: First, a denial that plaintiff was or ever had been a body corporate under the laws of the State of Kansas as "The Capitol Bank of Topeka," (which denial was verified by the affidavits of the defendants); second, defendants admitted the making of the notes and mortgage sued on, but alleged that the plaintiff purchased the same of said Spencer at a price agreed upon and for speculative purposes, and did not acquire or hold said notes or mortgage, or either of them, by reason of having made a loan of money on them, or either of them, or for any of the purposes for which it could legally acquire or hold the same, or either of them.

[Omitting the consideration of the first defense.]

IV. The final question as to the power of the plaintiff to acquire and hold the note and mortgage. The note and mortgage were made to Spencer. From him, as the owner and holder, the bank purchased. Was such a purchase beyond its power? Section 127 of article 16 of the general incorporation law (Gen. Stat. 225), specifically defines the powers of such associations, and is as follows:

"Any five or more persons in any county in this State may organize themselves into a savings association, and shall be permitted to carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing, credit therefor; and of buying and selling exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, of the State of Kansas, and of the city, county and school district in which any association shall be organized; of loaning money on real estate, and personal security, at a rate of interest not to exceed twelve per cent per annum; and of discounting negotiable notes, and notes not negotiable; and on all loans made may keep and receive the interest in advance."

Now the contention is, that the clause under which alone authority for this purchase can be claimed is that which authorizes "discounting negotiable notes, and notes not negotiable;" and that this was not a discount, but a purchase. Counsel for plaintiffs in error say:

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"Whatever loose or general meaning may have been given to the term *discount*, when not applied to banking business, no proposition is more firmly established by judicial decisions than this, that discounting paper, as understood in the business of banking, is only a mode of loaning money on the same and taking the interest in advance. *Niagara Co. Bank v. Baker*, 15 Ohio St. 68; *Talmage v. Pell*, 3 Seld. 343; *Fleckner v. Bank of United States*, 8 Wheat. 338; *People v. Utica Ins. Co.*, 15 Johns. 391; *Fireman's Ins. Co. v. Ely*, 2 Cow. 699; *Philadelphia Loan Co. v. Towner*, 13 Conn. 259; *McLean v. Lafayette Bank*, 3 McLean, 597; *Dunkle v. Renick*, 6 Ohio St. 527; *Farmers and Mechanics' Bank v. Baldwin*, 23 Minn. 196; 14 Alb. Law Jour. 391 (Dec. 9, 1876); *Fowler v. Scully*, 72 Penn. St. 456. It necessarily follows from the reasoning of these cases, that there is a difference between *discounting* a note and *buying* it. For authority directly on this point, see Morse on Banks and Banking, 20, and 1 Bouv. Law Dict. 481, title *Discount*, citing Pothier, *De l'Usure*, n. 128, where it is said the latter expression is used to denote the transaction 'when the seller does not indorse the note, and is not accountable for it.'"

An examination of some of the authorities chiefly relied on by defendant may be of value. In *Fowler v. Scully*, 72 Penn. St. 456, the question was as to the power of a national bank to take a mortgage to secure notes to be thereafter discounted; and by a divided court the mortgage was held void. There is nothing in the question or opinion which throws any special light on the question before us.

In the case of *Talmage v. Pell*, 7 N. Y. 328, it was decided that a banking corporation, empowered "to carry on the business of banking by discounting bills and other evidences of debt," was not thereby authorized to traffic in State stocks, and that a purchase of such stocks, with a view of sale, was beyond its powers.

In *Niagara Co. Bank v. Baker*, 15 Ohio St. 68, the plaintiff, a bank of the State of New York, sued the defendants as indorsers of certain promissory notes. The answer alleged a loan from the bank to them, and a discount of these notes at usurious rates. The reply denied any loan, and alleged that it discounted the notes in the usual course of business. Counsel for defendant laid down two propositions in their brief — 1st, that if the transaction was a loan, it was void for usury; and 2d, if a purchase, void for want of power in the bank to make it. The court in its opinion, after giv-

ing the general meaning of the word *discount*, as we quote hereafter, proceed : " And this brings us to the precise question upon which the decision of this case depends. Was this bank empowered to discount, *by way of purchase*, promissory notes? or must all such discounts be deemed loans, and thus be brought within the purview of the usury law? " And they conclude in favor of the latter alternative, saying, " But the naked power to discount paper is not given ; it is the *power to carry on the business of banking by* (among other things) *discounting bills, notes, and other evidences of debt.*" And then inquiring what "discounted paper" means, as used in the business of banking, hold, that it refers simply to loans, referring with especial stress to the case of *Talmage v. Pell*, *supra*, as an authoritative exposition of the New York statute under which plaintiff was organized.

In the case of *Farmers & M. Bank v. Baldwin*, 23 Minn. 198; 23 Am. Rep. 683, the language of the statute appears similar to that referred to in 15 Ohio St., *supra*. The bank was given "power to carry on the business of banking by discounting bills, notes," etc.; and a majority of the court held, that that was not a power to purchase such securities, but simply to loan thereon, with the right to take lawful interest in advance.

In *Fleckner v. Bank*, 8 Wheat. 338, it appeared that the plaintiff purchased from another bank a note which had passed to it through several parties from the original holder. The bank was forbidden to deal in any thing except bills of exchange, gold, or silver, or take more than six per cent upon its loans or discounts. It was claimed that the purchase of this note was *ultra vires*; but the court held otherwise, holding that such purchase was but a discount. In the opinion, STORY, J., speaking for the court, says : " But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount, must there not be some *chase in action*, or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a 'discount' by a bank means *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank."

We may also at this time properly notice a late case cited by the

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plaintiff, that of *Smith v. Exchange Bank*, 26 Ohio St. 141; Thompson's Nat. B'k Cases, 836. In that case the defense was, that the bank (a national bank) *purchased* the paper of the payees, and that it had no authority to make such purchase. Upon this the court uses this language: "It does not state that the purchase was made at a usurious rate of discount; but it avers that under the act of Congress to provide a national currency, under which the bank was incorporated, it had no authority to *purchase* the bill. It seems to be the idea of counsel making the objection, that negotiable paper, perfect, and available in the hands of the holder, is not the subject of purchase by a national bank at any rate of discount. This view, we think entirely erroneous. We see nothing in the act of Congress, nor in reason, why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper, made directly to the bank. It is true, that, as between natural persons, the purchase of such paper when made in good faith, and not as a disguise for a loan, is not subject to the usury laws; but it is otherwise as to a bank. In the business of banking, the purchasing and discounting of paper is only 'a mode of loaning money.'" And further on, in reference to any question of usury, the court holds that it arises between the bank and its customer, and not between it and the original parties to the paper.

These authorities go no further than this: that where an ordinary commercial bank is created, and power given it, not generally to discount, but specially to carry on the business of "banking by discounting," its power is limited to that of loaning money on paper, and on such loans subjects itself to the operations of the usury laws. It may not purchase, as an individual may, paper already existing at any price it may agree upon with the holder, but can only deduct from its face the legal interest in advance. We express no opinion upon these authorities, or the propositions they assert. But we draw two clear distinctions between them and the case at bar. And first, the plaintiff is not an ordinary commercial bank. At least, whatever may have been the practical workings of this bank, the intention of the legislature in the statute was, a "savings bank." That is the title of the article. The grant is of authority to organize a savings association. The first power is to receive money on deposit, and allow interest thereon; and that is the main purpose of a savings bank. It is true, among

the further powers are those of discount, and dealing in bullion and bonds ; but it is needful that some powers be granted of so using the deposits, and other funds, as will secure their safety, and enable the corporators to pay the interest on the deposits, and at the same time receive adequate compensation for their labor and the use of their capital. Just as power is given to an insurance corporation to invest its funds in such manner as will be profitable. And in interpreting the powers possessed by a corporation, we must not make the interpretation depend on the manner in which the corporation actually exercises its powers, but upon the intention of the legislature in the enactment of the statute. The intention was, "savings bank." The corporation may in fact have been a purely commercial bank. If it has misused its powers, the State alone may inquire. The extent of the powers granted is to be determined by the character of the institution intended by the legislature. It is said by the court, in the case from 23 Minn., *supra*, in support of the construction placed upon the powers granted by the statute: "The obvious intent of this legislation was to secure to the public business loans and accommodations at what was then regarded reasonable and not exorbitant rates of interest, and also to protect the shareholders of banks, and the banks themselves, against the risk of loss from inadequate securities, such as would likely be taken under the tempting influence of high rates of interest, regulated only by the necessities of borrowers, and the cupidity of bank directors." But the primary purpose of a savings bank is not to facilitate commercial transactions by securing to the public business loans and accommodations, but to furnish a safe place of deposit for funds. The other powers are subordinate to this.

Again, the power granted is the naked power of discounting, and not the power of carrying on the business of banking by discounting. And the term "discounting," includes purchase, as well as loan. "To discount, signifies, the act of buying a bill of exchange, or promissory note, for a less sum than that which upon its face is payable." 1 Bouv. Law. Dict., title *Discount*. "It is also undeniably clear, that the term *discount*, when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied, either to *loans* or *sales* by way of discount, when a sum is *counted off*, or taken from the face or amount of the paper, at the time the money is advanced upon

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it, whether that sum is taken for interest upon a loan, or as the price agreed upon a sale." *Niagara Co. Bank v. Baker*, 15 Ohio St. 85. See, also, case from 8 Wheat., *supra*.

We conclude therefore, that the purchase of the note and mortgage in question was within the powers granted to this savings bank.

This disposes of the case, and compels an affirmance of the judgment.

All the justices concurring.

Judgment affirmed.

THE STATE EX REL. MARTIN V. GILMORE.

(30 Kana. 551.)

Constitutional law — removal of member of legislature from office.

The Constitution of Kansas declares that each house of the legislature "shall be judge of the elections, returns and qualifications of its own members."

The legislature enacted that "any State, district, city, county or township officer, for whose removal from office by impeachment there is no provision," on conviction of intoxication shall be removed from office by the court. The Constitution also provides that "the governor, and all other officers under the Constitution, shall be subject to impeachment." *Held*, that the act is unconstitutional as vesting in others the power exclusively delegated by the Constitution to each house. *It seems* that members of the legislature are subject to impeachment.

ACTION to remove officer. By Laws of 1875, ch. 122, it is provided that:

"SECTION 1. Any State, district, city, county or township officer of this State, for whose removal from office by impeachment there is no provision, [who] shall in any public place within the State be in a state of intoxication produced by strong drink voluntarily taken, such officer shall be deemed to have committed an offense against public morals, and on conviction thereof shall be adjudged to have forfeited his office, and his said office shall thereupon be declared vacant by the court trying the cause."

Defendant was elected and qualified as a member of the lower house of the State legislature. Martin, as petitioner or relator, commenced an action under said act of 1875, in the name of the

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State of Kansas, as plaintiff, alleging that Gilmore, in August, 1877, while a member of the State legislature, "was guilty of being in a state of intoxication produced by strong drink voluntarily taken." Gilmore demurred, because the petition did not state facts sufficient to constitute a cause of action, and had judgment.

J. A. McHenry, county attorney, and *Kirkpatrick & Burge*, for plaintiff.

Cates & Keplinger, and *C. C. Chase*, for defendant.

BREWER, J. Defendant is a member of the present house of representatives of this State, having been elected in the fall of 1876. This action was brought under chapter 122 of the Laws of 1875, to remove him from office; and the single question presented is, whether the action will lie against him under that statute. It provides for the removal from office of "any State, district, city, county or township officer of this State, for whose removal from office by impeachment there is no provision." The Constitution, article 2, section 28, reads: "The governor, and all other officers under the Constitution, shall be subject to impeachment." And chapter 49 of the general statutes prescribes the general mode of procedure. On the one hand, it is claimed that in the comprehensive words, "all other officers under the Constitution," are included members of the legislature, and that they too are subject to impeachment, and, therefore, not included within the scope of said chapter 122. And on the other, that by the decision in the *Blount* case, it was long ago held by the United States Senate, that members of that Senate were not subject to impeachment, and that by the common understanding and consent of all this decision has been considered as applicable to members of all State legislatures, and that, therefore, the general words of our Constitution must be construed with this implied exception. So far as the Federal legislature is concerned, the decision in the *Blount* case, though rendered by a closely-divided Senate (14 to 11), has ever since been accepted as a correct exposition of the law, and that question is doubtless forever at rest. Yet that there is a marked distinction between the language of the Federal and the State Constitutions, is clearly shown by the able opinion of his honor, Judge TALCOTT, who decided this case in the District Court, from which we quote as follows:

“By the Federal Constitution, those subject to impeachment are ‘the president, vice-president, and *all civil officers of the United States.*’ By our State Constitution, those subject to impeachment are ‘the governor, and *all other officers under this Constitution.*’ Perhaps an understanding of the terms ‘civil officers of the United States,’ as used in the Federal, and ‘all other officers under this Constitution,’ as used in our State Constitution, will help in discovering the difference, if any, between the two. Judge STORY, in the first volume of his work on the Constitution, at section 793, after stating that the reasoning by which the construction was given to the Federal Constitution does not appear, says, ‘But it was probably held that *civil officers of the United States* meant such as derived their appointment from and under the national government, and not those persons who, though members of the government, derived their appointment from the States, or the people of the States.’ With this definition it will be seen at once that a United States senator is not a ‘civil officer of the United States,’ within the meaning of that provision of the Constitution, because he derives his ‘appointment from the States, or the people of the States,’ and not ‘from and under the national government.’ In giving the construction it did the question was, ‘whether a senator was a civil officer of the United States,’ within the purview of the Constitution; and it was decided by the Senate that he was not. Then, as a United States senator is not a ‘civil officer of the United States,’ and is not the president, or vice-president, he cannot be impeached, for by the terms of the Federal Constitution they are the only persons who can be impeached.

“Now, as to our State Constitution. It does *not* provide that the governor, ‘and all civil officers of the’ *State*; or, that the governor, and all ‘such as derived their appointment from and under the’ *State government*; or, the governor and all civil officers under this Constitution, shall be subject to impeachment; but it *does* provide that ‘the governor, and *all other officers under this Constitution,*’ shall be subject to impeachment. How the term, ‘all other officers under this Constitution,’ can be explained is more than I can see. It is its own explanation — its own definition. As to who is an officer of the United States, or a United States officer — or, as to who is an officer of the State, or a State officer — is a question about which there may be some doubt, and about which our own Supreme Court has been called upon to adjudicate; but

as to who are *officers under the Constitution*, there can be no doubt, especially as to those specifically enumerated therein. All we have to do for information is to turn to that instrument. But, it being conceded that a member of the legislature is an officer under the Constitution, it is not necessary, for the purposes of this case, to cite any of its sections for such proof."

But passing this question, and conceding the claim of counsel for the relator, that a member of the legislature of this State is not subject to impeachment, and still we think the judgment of the District Court must be sustained.

The Constitution declares, article 2, section 8, that "Each house shall be judge of the elections, returns, and qualifications of its own members." This is a grant of power, and constitutes each house the ultimate tribunal as to the qualifications of its own members. The two houses acting conjointly do not decide. Each house acts for itself, and by itself; and from its decision there is no appeal, not even to the two houses. And this power is not exhausted when once it has been exercised, and a member admitted to his seat. It is a continuous power, and runs through the entire term. At any time, and at all times during the term of office, each house is empowered to pass upon the present qualifications of its own members. By section 5 of the same article, acceptance of a Federal office vacates a member's seat. He ceases to be qualified, and of this the house is the judge. If it ousts a member on the claim that he has accepted a Federal office, no court or other tribunal can reinstate him. If it refuses to oust a member, his seat is beyond judicial challenge. This grant of power is, in its very nature (and so as to any other disqualification), exclusive; and it is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal or officer. It may appoint a committee to examine and report, but the decision must be by the house itself. It, and it alone, can remove. Perhaps, also, it might delegate to a judge or other officer, outside its own body, power to examine and report upon the qualifications of one of its members. But neither it, nor the two houses together, can abridge the power vested in each house separately of a final decision as to the qualifications of one of its members, or transfer that power to any other tribunal or officer. And an act which purported to grant to the District Court power to remove from

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office must be construed as not embracing members of the legislature; or if its language specifically names, or necessarily includes them, then as to them the act is unconstitutional.

The judgment will be affirmed, at the costs of the relator.

All the justices concurring.

THE STATE V. BUFFINGTON.

(30 Kans. 500.)

Criminal law — evidence — letters from prisoner to his wife.

On the trial of an indictment, a letter written by the defendant to his wife, but not in the custody or control of either of them, or any representative of them, but in the custody and control of the prosecuting witness, is competent evidence against the defendant, although a civil statute prohibits husband and wife from testifying to any communication by one to the other during marriage, and a criminal statute extends the provisions in civil cases to the "examination" of witnesses in criminal proceedings.

INFORMATION for carnally defiling a female under eighteen. On the trial the prosecution offered in evidence a letter written by defendant to his wife, confessing that he had committed a grievous offense, without specifying it, expressing remorse, and stating that he had left the State, etc. This was received under objection. The prisoner was convicted, and appealed.

R. D. Hartshorne and S. Stillwell, for appellant.

T. W. Cogswell and Hutchings & Denison, for the State.

VALENTINE, J. This was a criminal prosecution under section 233 of the crimes-and-punishments act; Gen. Stat. 369. The defendant was charged with defiling one Emily Barney, a female person under eighteen years of age, by carnally knowing her while she was confided to his care and protection by her parents. The girl Emily was a sister of the defendant's wife, and their father, Joseph M. Barney, was the prosecuting witness in the case. On the trial, the prosecution introduced in evidence, a letter from the defendant to his wife. This was done under the permission of the court, but over the objections of the defendant. The defendant

claimed that this letter was a confidential communication from himself to his wife, and therefore that it was not competent evidence against him. The admission of this letter in evidence is the first ruling of the court below of which the defendant now complains. For the purposes of this case, we shall assume that said letter was a confidential communication from the defendant to his wife; that it is what would ordinarily be called a privileged communication, and that it could not have been introduced in evidence in this case or in any other case, by either the husband or the wife, or against either of them, except with the consent of both, so long as the letter remained in the hands or under the control of either of them, or in the hands or under the control of any agent or representative of either of them. We assume this, however, without desiring to express any opinion upon the subject. And with this assumption was the said letter wrongfully introduced in evidence? We think not. It would seem that the letter was in the hands and custody of Joseph M. Barney, the prosecuting witness, at the time it was introduced in evidence. It had previously been sent through the post-office, and by mail, from the defendant to his wife. Barney received it from the post-office, properly directed to the defendant's wife. He delivered it to her, and she, after reading it, returned it to him, and he furnished it to the prosecution to be read in evidence as aforesaid. And there was no evidence tending to show that it was at that time in the custody or under the control of any other person except Joseph M. Barney and the prosecution. It does not appear that either the defendant or his wife had at that time any control over the letter. It is certainly true, that a communication between husband and wife is a privileged communication. But it is privileged only while it remains within their custody and control, or while it remains within the custody and control of their agents or representatives, and just so far as it remains within the custody and control of themselves or their agents or representatives. "A private conversation between husband and wife, who thought that no one overheard them, may be testified to by a concealed listener." *Commonwealth v. Griffin*, 110 Mass. 181. See, also, *State v. Center*, 35 Vt. 378. This rule also applies as to confidential communications between attorney and client. *Hoy v. Morris*, 13 Gray, 519; *Goddard v. Gardner*, 28 Conn. 172; 1 Greenl. Ev., § 239a. With reference to confidential communications between attorney and client, Dr. Wharton uses

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the following language: "If a legal adviser permits his client's papers to pass out of his hands into those of strangers, or if such papers are in any way extracted from his custody, they may be put in evidence by the party by whom they are held, as against the client. So far has this been pushed, that it has been held that if an attorney permits a witness to see such writings, such witness, not being a clerk of the attorney or legal adviser of the client, may be called to give secondary evidence of the writings, due notice being first given to produce them on the trial." 1 Wharton's Evidence, § 586. See, also, *Lloyd v. Mostyn*, 10 M. & W. 478. Mr. Greenleaf uses the following language (probably with reference to written evidence generally, but immediately following a section concerning "communications between husband and wife,") to-wit: "It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully; nor will it form an issue to determine that question." 1 Greenl. Ev., § 254a.

There is no statute in this State rendering said letter incompetent evidence in a case of this kind. The only statutes supposed to even look in that direction are the following:

Criminal Code, section 209: "The provisions of the law in civil cases, relative to *compelling the attendance and testimony of witnesses*, their examination, the administration of oaths and affirmations, and proceedings for contempt to enforce the remedies and protect the rights of parties, shall extend to criminal cases, so far as they are in their nature applicable thereto, subject to the provisions contained in any statute." Gen. Stat. 853.

Civil Code, section 323: " * * * In no case shall *either (the husband or wife) be permitted to testify* concerning any communication made by one to the other during the marriage, whether called while that relation subsisted, or afterward." Laws of 1872, page 335.

It will be seen that these statutes do not go to the extent of excluding said letter as evidence. While the Civil Code provides that neither the husband nor wife shall, as a witness, furnish evidence, concerning confidential communications, yet it does not provide that others who may happen to be possessed of such communi-

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cations shall not do so; and while the Criminal Code provides that the provisions of law in civil cases relative to "compelling the attendance and testimony of witnesses," and "their examination," "shall extend to criminal cases," yet it does not provide that the provisions of law in civil cases relating to the *competency* of witnesses and the *competency of evidence* shall extend to criminal cases. *The State v. Howard*, 19 Kans. 509, 510. A certain territorial district judge, once, however, in the early days of Kansas, thought otherwise, and permitted a defendant who was charged in a criminal case with murder in the first degree to testify in his own behalf simply because defendants in civil cases were then (as now) allowed to testify in their own behalf. But whether said district judge would have compelled the defendant in that case to testify against himself, and in favor of the prosecution, at the instance of the prosecution, simply because defendants in civil cases could at that time be compelled to testify against themselves and in favor of the adverse party, at the instance of the adverse party, is not known. The provision quoted from the Criminal Code is old. It was first enacted in 1855 (Laws of 1855, page 621, § 16), and was re-enacted in 1859 (Laws of 1859, page 209, § 188; Comp. Laws of 1862, page 264, § 188); and again re-enacted in 1868. Gen. Stat., page 853, § 209. And the law making defendants competent witnesses in civil cases, for and against themselves, was passed in Kansas more than twenty years ago. Under section 215 of the Criminal Code, as amended in 1871 (Laws of 1871, page 280, § 1), a wife is a competent witness in a criminal case against her husband if she chooses to testify. *The State v. McCord*, 8 Kans. 232.

[Omitting a point of practice.]

The judgment of the court below will be affirmed.

All the justices concurring.

Judgment affirmed.

ASHTON V. INGLE.

(20 Kans. 670.)

Homestead exemption — tenant house.

A house on a lot adjoining the homestead of the owner, in a city, and by him owned and rented to a tenant not in his employ, and occupied exclusively by such tenant and his family, is not exempt under the homestead laws exempting one acre in a city, "with all improvements," "occupied as a residence by the family of the owner," although all the land claimed to be exempt is less than one acre.

ACTION to restrain sale of a homestead on execution. The opinion states the facts. The defendant had judgment.

L. M. Goddard, for plaintiff.

Thomas P. Fenlon and Lucien Baker, for defendants.

VALENTINE, J. Ruth A. Ingle recovered a judgment in the District Court of Leavenworth county against John Ashton and Joseph Ashton for the sum of \$776.96. An execution was issued on this judgment, and placed in the hands of Percival G. Lowe, sheriff of said county. Lowe by virtue thereof levied upon certain real estate situated in said county, as the property of said John Ashton, and advertised the same for sale. Ashton then commenced this action against said Ingle and Lowe to restrain them from selling said property, and to set aside the levy of said execution. Trial was had in the court below, before the court alone, which trial resulted in a finding and judgment in favor of the defendants and against the plaintiff; and the plaintiff now seeks to have said finding and judgment reversed by this court.

The plaintiff claims that said property is a part of his homestead and therefore that it is and was exempt from said judgment, execution and levy. This is the only question in this case. Before proceeding, however, to discuss this question, we would say that as the finding of the court below was general, and in favor of the defendants, we must presume that every thing necessary to be found in the case was found in favor of the defendants, and against the plaintiff Ashton. And also, where there was conflicting evidence we must

presume that the court below believed that which was most favorable to the defendants, and disbelieved that which contradicted it; and we must view the evidence in the same manner that the court below did. As to the *status* of the property, we must consider what such status was at the time when said judgment was rendered upon which said execution was issued, and not merely what it was at the time when said levy was made, or at the time when this suit was commenced, or trial had. For if the property was not a part of Ashton's homestead at the time when said judgment was rendered, then the judgment became a lien upon the property (Gen. Stat. 708, § 419; *Kirkwood v. Koester*, 11 Kans. 471); and no subsequent homestead right or interest acquired by Ashton would defeat the judgment-lien. The judgment-lien in such a case would be paramount, and the homestead right or interest would be subordinate and inferior thereto. *Bullene v. Hiatt*, 12 Kans. 98; *Robinson v. Wilson*, 15 id. 595; *Hiatt v. Bullene*, ante, p. 557. And under and by virtue of such judgment-lien the property may be levied upon and sold under an execution issued on such judgment, although at the time of the levy and sale the property may be occupied as a homestead of the owners.

Said judgment was rendered on the 22d of January, 1877. At that time the plaintiff Ashton owned a certain L-shaped piece of ground situated in Leavenworth City. This ground was all fenced in one inclosure, and there was less than one acre in the piece. One branch of the L fronted west on Broadway street, and the other branch fronted north on Oak street, and within the inner angle formed by the two branches of this L, one Helmer owned and occupied a piece of land. Helmer's land also fronted on both Broadway and Oak streets, the two streets crossing each other at right angles at the north-west corner thereof. Lowe levied upon only a portion of that branch of said L which fronted north, on Oak street; and that which he levied upon is the only land now in controversy — and for convenience, we will call it one parcel of land, the north parcel; and the portion of the L which he did not levy upon as another parcel of land, the south parcel. On the south parcel Ashton had a large, fine, brick dwelling-house, which he, with his family, occupied as a residence. On this same parcel he also had a cistern, an outhouse, a barn, a hog-pen, a hen-house, a wood yard and proper walks. On the north parcel there were two small houses, and a cistern, and proper walks. These two small

houses, with the grounds around them, were rented by Ashton to tenants, for a money rent; and up to the time when the judgment upon which said execution was issued was rendered, the tenants who for the time being occupied said houses and grounds had exclusive use thereof, except as follows: A clothes-line was stretched from one of the small houses across the north parcel onto the south parcel, and was used jointly by all the occupants of both parcels of land. A walk also extended from the south parcel across the north parcel to Oak street, which walk was used by the tenants of both houses, and sometimes by the Ashtons. The cistern on the north parcel of land was used by the tenants of both houses all the time, and by the Ashtons "occasionally, when the other cistern gave out."

After said judgment was rendered, Ashton, for the purpose of making said north parcel of land a part of his homestead, and for the purpose of defeating any levy of any execution which might be made upon said north parcel, assumed, at least nominally, greater control over the same, and over the houses thereon, than he had formerly done. In the written leases which were afterward executed he rented only certain rooms of the houses, and reserved to himself the rest of the houses, and the control of the grounds around them. Though in fact, and notwithstanding such written leases, he still allowed the tenants to occupy and use all of the two houses, and all the grounds around them, except the basement of one of the houses. But, as we have before stated, the question, so far as this case is concerned, is not governed by what transpired *after* said judgment was rendered, but it is governed by what transpired before and what existed at the time the judgment was rendered. The question is, not whether said north parcel has *become* a part of Ashton's homestead since said judgment was rendered, but it is whether *it was* a part of his homestead at the time when such judgment was rendered. At the time said judgment was rendered only one of said houses was actually rented, or occupied, and the other was vacant; but the vacant house had been occupied by a renter up to only a short time previously, and was then kept by Ashton merely to be rented, and was shortly afterward rented. And the first time it was rented afterward it was rented orally, and in the same manner that it had previously been rented. It was, therefore, so far as any question in this case is concerned, substantially in the same condition as though it had been actually

rented and occupied by a tenant at the time such judgment was rendered.

Now, was the said north parcel of land, with the two small houses and the cistern, or any part thereof, a portion of Ashton's homestead, so as to be exempt from said judgment, execution and levy, under the provisions of the homestead exemption laws? We think not. The homestead exemption law, so far as it applies to this case, reads as follows:

"A homestead, to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city (without regard to value), occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale," etc.

Now the property, in order to be exempt, must be "a homestead," or a part of a homestead, and it must be "*occupied as a residence by the family of the owner.*" Now, the two *small* houses were not a part of Ashton's homestead, in fact, whatever they might be *constructively*. And they were not "*occupied*" at all by Ashton's family, either as a "*residence*" or otherwise. Mr. Justice BRADLEY, of the Supreme Court of the United States, in commenting upon the homestead exemption provision in the Constitution of Florida, uses the following language: "In the case of a farmer, therefore, it is clear that the exemption embraces his house and farm, not exceeding the amount limited (160 acres, without regard to value). Of course, it includes (and so the Constitution declares) the improvements thereon. Those improvements, however, must be such as to make them properly a part of the homestead, such as outhouses, barns, sheds, wagon-houses, fences, etc. *They would not embrace tenant houses*, though built on the farm, for these would be no proper part of the farm homestead. They constitute capital separately invested. They produce a revenue of their own, distinct from that of the farm. For the same reason, the farmer's homestead would not include a saw-mill, or a grist-mill, or a carding and fulling mill, though erected on a portion of the tract of which the farm is a part. These are separate enterprises, in which the farmer has been enabled to invest his surplus capital. They are no part of the farm. If he runs them, he does it as a separate business from that of his farm, and he cannot claim both as appurtenant to and part of his homestead. They constitute the basis of outside and separate industries." *Greeley v. Scott*, 2 Wood's Rep.

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657, 659. The foregoing views of Mr. Justice BRADLEY are fully sustained by the following cases: *Casselman v. Packard*, 16 Wis. 114; *Kurz v. Brusch*, 13 Iowa, 371; *Rhodes v. McCormick*, 4 id. 368; *Hoitt v. Webb*, 36 N. H. 158; *Dyson v. Sheley*, 11 Mich. 527; *Gregg v. Bostwick*, 33 Cal. 220; *Iken v. Olenick*, 42 Tex. 195. But on the other side of the question see the following cases: *Hancock v. Morgan*, 17 Tex. 582; *Noland v. Reed*, 38 id. 425; *Hubbell v. Canady*, 58 Ill. 425; *Kelly v. Baker*, 10 Minn. 154; *Clark v. Shannon*, 1 Nev. 568.

Mr. Thompson, in his valuable work on Homesteads and Exemptions, section 130, uses the following language: "This last case (that of *Gregg v. Bostwick*, *supra*) very clearly conducts us to the rule, that houses built for the purpose of being rented to tenants, thus yielding to the debtor a revenue separate from any use immediately connected with his dwelling, form no part of his homestead. This rule, at once so reasonable and easy of application, has been aged upon by several courts (here citing cases from California, Michigan, Wisconsin, Iowa and New Hampshire). It has been denied in Texas (here citing 38 Tex. 425), but, as we have seen, in pursuance of a view of the Constitution of that State, which had been since substantially overruled (here citing section 127 of his work, and 42 Tex. 105, 201); and in Illinois, where a dwelling and a storehouse occupied by a tenant stood upon one lot, the whole within the statutory limit of value, the storehouse was held a part of the homestead — a view which must be deemed salutary, under a statute limiting the value of the homestead to \$5,000" (here citing 58 Ill. 425). See, also, section 120 of Mr. Thompson's work, and cases there cited.

In the case of *Casselman v. Packard*, *supra*, Judge COLE uses the following language: "We cannot believe the legislature ever intended that a person should hold all the buildings which might be erected upon a quarter of an acre of ground in a city or village, whatever might be their character, or for whatever purposes they were designed, under the homestead exemption law, merely because he might live in one of them. Such a construction seems to us most unreasonable. The statute exempts the given quantity of land, with the dwelling-house thereon, and its appurtenances. Of course, the exemption of that quantity of land has regard to the purposes for which it is used." 16 Wis. 115.

In the case of *Kurz v. Brusch*, *supra*, Judge WRIGHT uses the

following language: "It was never intended that other buildings, though on the same lot, buildings not appurtenant to the homestead as such, those not used and occupied by the owner in the prosecution of his own ordinary business, *those rented and yielding a revenue to their owner* — we say it was never intended that such should be exempt. If so, the law could be made to cloak the most stupendous frauds. For if one such building may be exempt, so may all that could be placed upon a half-acre, if in a town, or forty acres, if in the country, without limit as to value. And thus the statute, instead of securing to the family a home, where they may be sheltered, and live beyond the reach of financial misfortune and the demands of creditors, would give them property never contemplated by its letter or spirit." 13 Iowa, 374, 375.

In Kansas there is no homestead exemption law as against taxes, or purchase-money, or claims for improvements, or liens given by the consent of the owner and wife, or owner and husband, as the case may be, or liens existing against the property prior to its occupancy as a homestead; but as to every other debt or claim there is a liberal homestead exemption law. Under it the owner of real estate may hold the same exempt from all process (except that for the collection of taxes, purchase-money, claims for improvements, and to enforce voluntary and pre-existing liens), subject to no limitations, except as to its *extent* as a homestead, and its *use and occupation* as such. As to its *extent* as a homestead, the owner may hold 160 acres of farming land, or one acre within the limits of an incorporated town or city without regard to value. It may be covered with costly buildings, with palatial residences worth hundreds of thousands of dollars, and yet all be held exempt from process, provided it can all be called the *homestead* of the owner. As to *use and occupation*, it must be used as the homestead of the owner, and must be occupied by his family as a residence, or it will not be exempt. Any portion of his real estate not so used and so occupied will not be exempt, whatever may be the extent or value of such real estate, great or small. But the law, however, does not use the words "homestead," and "occupied," and "residence," in any narrow and limited sense. The word "homestead," does not include merely the dwelling-house, but it also embraces every thing connected therewith which may be used and is used for the more perfect enjoyment of the home, such as outhouses for servants, for stock,

Ashton v. Ingle.

or property, gardens, yards and farming land to the extent of 160 acres, or land within the limits of an incorporated town or city to the extent of one acre. The word "occupied," does not always require an actual occupancy, but it may sometimes permit a constructive occupancy. The word "residence," like the word "homestead," is not confined merely to the dwelling-house, but it may also include every thing connected therewith used to make the home more comfortable and enjoyable. But the words "homestead" and "residence," cannot be intended to include some other and independent family's home and residence. Where houses and lots are rented, for a money rent, to tenants, who are not servants or employees of the owner, with the intention that such houses and lots shall become the homes and residences of such tenants and their families, and they actually do become the homes and residences of such tenants and their families, the owner certainly cannot then claim that such houses and lots are a part of his own home and residence, although they may adjoin the same. In order that any thing shall be a part of the homestead, it must not only be connected therewith as one piece of land is connected with another to which it adjoins, but it must also be used in connection therewith and as a part thereof. In legal phrase, it must be appurtenant thereto. Any other view than this would allow an owner of real estate in a city to own hundreds of thousands of dollars' worth of property exempt from his just and legal debts. He could cover his acre of ground with costly buildings, rent a portion thereof to various families for residences, rent other portions for business purposes, other portions for manufacturing purposes, and others still for offices, and reserve merely one, two, three or four rooms for his own use as a residence, and then hold all these buildings, and the acre of ground, exempt from his just debts. The framers of the Constitution and of the exemption laws certainly never contemplated any such result from their labors.

The judgment of the court below must be affirmed.

All the justices concurring.

Judgment affirmed.

WEICHSELBAUM v. CURLETT.

(20 Kans. 700.)

Landlord and tenant — right of tenant to acquire title as against landlord.

A tenant, under no obligation to pay taxes on the demised premises, may acquire valid title to the premises on tax sale during the term, and thereby defeat his landlord's claim for subsequently accruing rent.

ACTION for rent. The opinion states the facts. The defendant had judgment.

Nelson Adams, for plaintiff.

N. B. Freeland, for defendant.

HORTON, C. J. The plaintiff, Weichselbaum, was the owner of three certain buildings, situated on the Fort Larned military reservation, in Pawnee county. On 13th March, 1875, he rented the buildings to the defendant Curlett, for one year from the 1st of May following, at a monthly rental of \$17.50. The defendant paid the rent until 29th February, 1876, at which time, and while he was occupying the building as a tenant of plaintiff, he purchased them at a tax-sale held that day — the buildings having been sold as personal property, for personal taxes. The defendant has continued to occupy the buildings, and has removed material from them of the value of \$26.50. This action was brought by the plaintiff to recover of the defendant rent for the buildings from February 29th to the 1st of August, 1876, and for damages for the removal of parts of the buildings. Upon the foregoing facts, the District Court found, "as a conclusion of law, that the contract of lease between plaintiff and defendant was an illegal contract, and therefore cannot be enforced" — and gave judgment in favor of the defendant.

The judgment of the court below in favor of the defendant must be affirmed, and the claims of the plaintiff denied; but we base our decision upon different reasons from those given by the District Court. None of the testimony produced upon the trial has been brought to this court, and we have nothing but the pleadings, and

conclusions of fact, to consider. At the time of the tax sale, all the rent had been paid. Curlett was under no obligations to pay the taxes, or discharge the property from the lien; and he therefore had the right to purchase the buildings at such sale, to thereafter occupy them as his own, and after such sale to resist the recovery of his former landlord for rent, or damages to the property. While a tenant cannot dispute the title of his landlord so long as it remains as it was at the time the tenancy commenced, he may show that the title under which he entered has expired, or has been extinguished. When under no obligation or duty to discharge the taxes on the property, he may purchase it at a tax sale during his term. *Taylor's Land. & Ten.*, § 705; *Simers v. Saltus*, 3 Denio, 214; *Jackson v. Rowland*, 6 Wend. 666; *Ferguson v. Etter*, 21 Ark. 160; *Bettisin v. Budd*, 17 id. 546. After the tax sale of 29th February, 1876, the plaintiff had no interest in the buildings, and the defendant was not answerable for rent for his occupation or use of them to him.

Counsel for plaintiff attempts to raise the question, that the tax sale was void, but sufficient proceedings are not set forth to bring this matter under review. All the presumptions are in favor of the judgment of the District Court; and upon the conclusions of fact found, we must hold all the tax proceedings valid, and that the tax sale passed to the purchaser a good title. If these proceedings were void for any reason, it was incumbent upon the plaintiff to have obtained findings of fact fairly presenting the alleged defects. This was not done. That the court below gave a wrong reason for a right decision, does not affect the material rights of the plaintiff, and is no cause for a reversal.

The judgment of the District Court will be affirmed, with costs. All the justices concurring.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

STATE EX REL. ATTORNEY-GENERAL V. SEAY.

(64 Mo. 38.)

Constitutional law — vacancy in office.

The Constitution of Missouri authorizes judges to hold office during a fixed term, and until their "successors" are "elected and qualified." In case of a "vacancy" by death, the governor is to order a new election. A, a judge, was elected for a term expiring on the first Monday of January, 1875. In November, 1874, B was elected as his successor, was duly sworn, and was a person qualified for the office, but two days before the commencement of his term he died. *Held*, that A's right to hold over ceased with B's qualification and did not revive with his death, and that a new election was authorized.

PROCEEDING to try title to office. The opinion states the facts.

C. M. Napton, for relator.

Lay & Belch, with *John W. Booth*, for respondent.

HENRY, J. This is a proceeding by the State, through the attorney-general, to try the right of the defendant to the office of judge of the ninth judicial circuit.

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In November, 1868, D. Q. Gale and one Peter B. McCord were candidates for judge of the ninth judicial circuit. On the first Monday in January, 1869, Gale entered upon the discharge of the duties of the office, and continued to discharge them until the expiration of the term of office commencing on that day. In November, 1874, Peter B. McCord was duly elected to succeed Gale, received his commission from the governor, and in December, 1874, took and subscribed the oath of office. On the 2d day of January, 1875, before his term of office commenced, he departed this life. The governor issued a writ for an election to be held the 3d day of March, 1875, to fill the vacancy which, in his judgment, the death of McCord had occasioned, and respondent at that election received a majority of the votes cast, was commissioned and qualified, and entered upon the discharge of the duties of the office.

These are the facts which appear of record, and about which there is no controversy. The relator in his information alleges that said Gale, for his first term, was duly elected, commissioned and qualified.

The respondent in his answer denies that Gale was elected or commissioned, or that he took the oath of office; and alleges that he was an intruder and usurper, and that his usurpation commenced on the first Monday of January, 1869, and continued to the first Monday of January, 1875; admits that there was an election in November, 1868, and that Gale and McCord were candidates, but alleges that McCord was then duly elected. He also charges in his answer, that at the date of the writ of election, "a vacancy in fact existed and that said Gale did not in fact perform nor claim to perform, nor assume to perform, nor claim the right to perform the duties of said office; but on the contrary had wholly given up and abandoned said office, and had engaged in the practice of law, as an attorney-at-law, in the several Circuit Courts of the said ninth judicial district.

To respondent's answer the relator filed a demurrer, and respondent contends that by the demurrer it is admitted that Gale usurped and also that at the date of the writ of election he had abandoned the office.

[Omitting some preliminary questions.]

Having disposed of these preliminary questions, we come now to the main question in this case: Was there a vacancy in the office of judge of the ninth judicial district on the first Monday in January,

1875? If there was, the demurrer must be overruled and a judgment rendered for defendant.

In November, 1874, McCord was elected. In December following he received his commission, and took and subscribed the prescribed oath of office, and on the 2d day of January, two days before the term for which he was elected commenced, he departed his life. The Constitution of 1865, art. 6, § 14, provides that the circuit judges "shall be elected for the term of six years, but may continue in office until their successors shall be elected and qualified." The same section also provides that "if any vacancy shall happen in the office of any circuit judge by death, resignation, removal out of his circuit, or by any disqualification, the governor shall, upon being satisfied that a vacancy exists, issue a writ of election to fill such vacancy."

We are referred to the case of the *State v. Lusk, supra*, as an authority in support of the position that the death of McCord before his term commenced created no vacancy. On the 24th day of March, 1845, the general assembly passed an act establishing the office of public printer, and provided that "a public printer shall be elected at the present session of the general assembly, and at every regular session thereafter, by joint vote of the two houses;" that he should hold his office for "two years, commencing on the first of May next thereafter, and until his successor shall be elected and qualified; and that public printers thereafter elected shall hold office for two years, and until their successors shall be elected and qualified." The 6th section provided that "if the public printer should die or resign, or if from any other cause the office should become vacant, the governor shall appoint a public printer, who shall give bond and qualify, and shall hold his office for the same time that the printer in whose stead he shall be appointed would have held."

On the 4th day of February, 1851, James Lusk was duly elected public printer, and thereupon gave bond and qualified. The general assembly, which convened in December, 1852, failed to elect a successor, and in May, 1853, the governor appointed John G. Treadway. It was insisted that the failure of the general assembly to elect created a vacancy which the governor could fill by appointment, but this court in that case held otherwise.

In the case at bar there was an election. The successful candidate, McCord, received his commission and took the oath of office.

The limit of Gale's term of office fixed by the Constitution was six years from the first Monday in January, 1869, if a successor should be duly elected and qualified. His successor was duly elected and qualified. There was no one elected by the general assembly to succeed Lusk, and this makes a material and vital difference between the two cases, and without overruling that we may, in this case, determine that there was a vacancy created by the death of McCord.

The case of the *Commonwealth v. Hanley*, 9 Barr. 513, is in many of its features similar to this, and is confidently relied upon by relator. Hanley was elected clerk of the orphans' court on the second Tuesday in October, 1845, for three years from the first day of December, 1845, "and until a successor should be duly qualified." He qualified and entered upon the discharge of the duties of the office. On the second Tuesday in October, 1848, one Brooks was elected to succeed Hanley, but died on the 7th day of November following, within thirty days from the day of election, and by the law of that State he could not have qualified to fill the office by taking the necessary oath, or by giving bond within thirty days from the day of election.

The opinion of the court was delivered by ROGERS, J., and we quote from that opinion so much as we think bears upon the questions discussed in this case. "Was there a successor duly qualified within the spirit of the Constitution? is the point on which the question mainly if not entirely depends. Being duly qualified in the constitutional sense, and in the ordinary acceptance of the words, unquestionably means that the successor shall possess every qualification; that he shall in all respects comply with every requisite, before entering on the duties of the office; that in addition to being elected by the qualified electors he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation to support the Constitution of the Commonwealth, and to perform the duties of the office with fidelity. Until all these prerequisites are complied with by his successor (for if you can dispense with one, you can dispense with all) the respondent is *de jure* as well as *de facto* the clerk of the orphans' court."

The words are emphatic and full of meaning. The successor must not only be qualified, but duly qualified; and qualification for office, as defined by the most approved lexicographer, is "en-

dowment, or accomplishment that fits for an office; having the legal requisites, endowed with qualities fit or suitable for the purpose."

If McCord had died after his election and before he received his commission and qualified, *Commonwealth v. Hanley* would be an authority direct to the point that his death created no vacancy, and we infer from the opinion of the court, that if in that case Brooks had duly qualified and died before the commencement of the term for which he was elected, the court would have held that his death created a vacancy. Here it is admitted that McCord was duly elected and commissioned, took and subscribed the prescribed oath, was thirty years of age, learned in the law, and resident in the ninth judicial circuit, and was therefore, at his death, "duly qualified," as those words are expounded by the learned judge in *Commonwealth v. Hanley*.

By the law of Pennsylvania, Brooks was not permitted to give his official bond or take the oath of office within thirty days after his election, but by § 2, art. 1, ch. 4, Wagn. Stat., it is provided that "each judge or justice shall, within thirty days after the receipt of his commission, and before entering upon the duties of his office, take the oath of loyalty prescribed by the Constitution of the State, and that he will faithfully demean himself in office." So that, taking of the oath of office by McCord was not premature, but was taken in compliance with the law.

There is such a conflict between the California cases which have been cited, that they are of but little authority on either side of the question. The earlier cases sustain defendant's view. They are, however, overruled, in two cases more recently decided, but by a divided court, the dissenting judges adhering to the doctrine of the former cases.

We have been referred to cases in New York and elsewhere, in which are observations to the effect that an office cannot be considered vacant while there is an incumbent legally in office, and discharging the duties of the office, but this we do not controvert, and it only brings us back to the question, was there an incumbent of the office of judge of the ninth judicial circuit when the governor issued his writ of election? If there was there was no vacancy, and those cases would be in point; but the very question we are discussing is, whether there was then an incumbent, and this turns on the meaning of the word *qualified*, as used in our Constitution of 1865.

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The case of the *State v. Hopkins*, 10 Ohio St. 509, is so like the case we are considering in its facts, and so directly sustains the position of the respondent on the main question in this case, that we feel inclined to state fully the facts of the case, and the opinion of the court so far as it bears upon that question. By the statute of that State the county commissioners were expressly authorized by statute to appoint a county treasurer, whenever that office became vacant "by death, resignation, removal, neglect to give bond, or from any other cause." At the fall election of 1857 one Hopkins was re-elected county treasurer, and on the first Monday of June, 1858, having been duly qualified, entered upon his second term of office. At the regular election in the fall of 1859, Matthias Rapp was duly elected to succeed Hopkins. Afterward, in 1859, the governor issued to said Rapp a commission as county treasurer, which was transmitted to the county clerk. On the 27th day of November, 1869, before the commencement of his term, said Rapp, deceased, having never, in fact, received his commission. On the first Monday of September, 1860, the day on which the term for which Rapp was elected commenced, the county commissioners appointed William Adams to fill the vacancy occasioned by the death of Rapp. Adams qualified and Hopkins refused to yield possession of the office.

The principal question in that case, as in this, was, whether the death of the officer elect, before his term of office commenced, occasioned a vacancy. The court in that case says: "By reason of the death of Matthias Rapp, prior to the commencement of the term for which he had been elected, there was no person, on the first Monday of September, 1860, entitled to take and hold the office during the regular statutory term commencing on that day. And this want of a regular incumbent for the term occasioned by the death of a party who would otherwise have been such, constitutes, as we think, a vacancy occasioned by death, within the meaning of the statute. And were it necessary, we should hold that under the statute last cited the office became vacant upon the failure of Rapp to give bond and take the oath of office. True, this failure was caused by the act of God, and not by the laches of the party, but its effect upon the office is the same, whatever may have been the cause.

"This construction makes the legislative intention accord with the constitutional policy, by which no person is 'eligible to the

office of county treasurer for more than four in any period of six years.'"

The last paragraph of the opinion we quote, because it is urged that the court was controlled by this constitutional provision in its conclusion that there was a vacancy. The court, on the contrary, says with emphasis, that the vacancy was occasioned by death, and there is no intimation in the opinion that the constitutional provision, which is only incidentally referred to, in any manner influenced the conclusion which the court arrived at in that case.

If the death of Rapp occasioned a vacancy in that, no one would contend that McCord's death did not occasion a vacancy in this case. Rapp had not received his commission, had not given his official bond, had not taken the oath of office, had done nothing but announce himself a candidate, and received a majority of the votes cast, while McCord had done all that was required of him by the law, and within the time prescribed by the statute.

The *People v. Lord*, 9 Mich. 227, is another case relied upon by relator, as expounding the meaning of the word *qualification*, in favor of the view taken by him.

The Constitution of Michigan, under which that case was determined, provides "that a judge of probate shall hold his office for four years, and until his successor is elected and qualified." In 1860, North, then in office, was re-elected as his own successor, for the term commencing January 1, 1861. He died November 22, 1860. Van Valkenburg was appointed by the governor to fill the vacancy, which in his judgment had occurred. On the first of January, 1861, under the impression that the time for which the first appointee, Van Valkenburg, was appointed, ended at the expiry of North's first term, the governor appointed Henry Lord for the next term. It will be observed that North died in November, 1860, before the commencement of his second term. It does not appear that after his election he was otherwise qualified under the law of that State.

The case presents the same material difference from this case that we have noticed as distinguishing the case of *The State v. Hopkins*, 10 Ohio St. 509, and *The Commonwealth v. Hanley*, 9 Barr. 517, from the case at bar.

In the opinion of the court in *The People v. Lord*, the court says: "His (Van Valkenburg's) term of office did not expire on the 1st of January, 1861, unless some one elected and qualified was then

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ready to take the office." We submit that the language of the court extends the term beyond the time fixed by the express words of the Constitution of Pennsylvania. The constitutional limit was, "until a successor is elected and qualified," but the court adds, "and ready to take the office." The construction of the word *qualified* was not directly before the court. There had not been an election, and that, under the law of Michigan, was decisive of the question. There was no question about the qualification or what amounted to qualification of one elected, for no one had been elected. We cannot, therefore, regard it as a direct authority on the question, but if it were, we think that the weight of authority is against it. The law abhors vacancies in public offices, and great precautions are taken to guard against their occurrence. The policy of the law is to have some one always in place to discharge the duties of public offices, and in a doubtful case the construction of a law fixing the tenure of an office would be greatly influenced by that consideration; but where, as in this case, there is a *casus omissus* resulting from giving the language of the law the only construction of which it is fairly susceptible, the courts must leave it to the law-making power to make provisions to avoid such a consequence.

By the term of the Constitution, Gale's term was to cease when a successor should be elected and qualified. His successor, McCord, was duly elected and duly qualified, and when that occurred Gale's right to hold over ceased, and the death of that successor, before his term commenced, did not revive a right in Gale which ceased when McCord qualified.

With the concurrence of the other judges, the demurrer is overruled, and judgment for respondent Seay.

Judgment for respondent.

STATE EX REL. BROWN V. BAKER.

(84 Mo. 187.)

Bond — surety — signature of co-surety forged.

The defendant signed an official bond as surety, on the representation that another surety, whose signature appeared thereon, had actually signed it. That signature was a forgery, and the person whose name had been forged did not communicate the fact to the defendant. The obligee was ignorant of the condition on which the defendant had signed. *Held*, that the defendant was liable.*

ACTION on a bond. The opinion states the facts.

C. E. Moorman, for plaintiffs in error.

Crittenden & Cockrell, for defendant in error.

SHERWOOD, J. It is not necessary to review the action of the court in refusing to set aside the judgment by default, since we do not regard the matter which the affidavits contain as constituting any defense. The fact that the name of Milly A. McFarland, one of the apparent sureties on the administration bond, was forged, or that, when informed of such forgery by the administrator, the principal in the bond, after the acceptance of the bond by the proper officer, she did not inform those who had really signed the bond as sureties, of the forgery, cannot affect their previously incurred liability, or distinguish this case, in point of principle, from that of *The State v. Potter*, 63 Mo. 212; 21 Am. Rep. 440; since in this case, as in that, the bond was complete, and the condition upon which the sureties signed unknown to the officers, and equally broken; in the former case, by failing to obtain the signature of a certain person as co-surety; in the latter, by a like failure, coupled with the forgery of the name of the promised person.

We are unable, therefore, to make any substantial distinction between the two cases, and shall affirm the judgment. The other judges concur.

Judgment affirmed.

*See *Guild v. Thomas* (54 Ala. 414), 25 Am. Rep. 708, and note, 708; *Hall v. Parker* (81 Mich. 590), 26 Am. Rep. 540.

RITTENHOUSE V. AMMERMAN.

(64 Mo. 197.)

Promissory note — executed by executor — descriptio personæ.

An executor, for an expense connected with his trust, executed a promissory note in the ordinary form, on interest, adding to his signature the words, "executor of," etc. Held, that the executor was liable individually, and not in his representative capacity, on the note.*

ACTION on a promissory note. The opinion states the facts.

Lay & Belch, for appellant. There was no personal liability on the note. *Bank of Troy v. Topping*, 9 Wend. 273; 13 id. 557. See 2 Will. on Ex'rs, 1610; *Ten Eyck v. Vanderpoel*, 8 Johns. 120; *Schoonmaker v. Roosa*, 17 id. 301; *Cobb v. Page*, 17 Penn. St. (5 Har.) 469; *Beall & Co. v. Ridgeway*, 18 Ala. 117.

1. *P. Rittenhouse*, for respondent.

NORTON, J. The defendant in this case was the executor of one James Johnson, deceased, and as such he procured Johnson and Rittenhouse, who were engaged in publishing a newspaper, to publish notices for the sale of his testator's land, and afterward executed and delivered three several negotiable notes, payable to said Johnson and Rittenhouse, for such publication. The plaintiff, as administrator of the partnership estate of Johnson and Rittenhouse, instituted suit on said notes against defendant Ammerman, and obtained judgment against him. On the trial it was admitted that the estate of James Johnson was insolvent, and objection was made to the introduction of the notes in evidence, which was overruled, and judgment rendered against defendant *de bonis propriis*.

The questions presented for determination are: First, is the defendant liable in his individual or representative capacity, and if liable, is there a sufficient consideration to support the promise to pay?

The individual liability of defendant is in a great measure to be determined from the character of the notes themselves. The fol-

* See *Powers v. Briggs* (79 Ill. 498), 23 Am. Rep. 175, and note, 175.

lowing is a copy of one of them, the other two being like it in all respects except as to date, amount, and time of payment.

"\$15.00.

VIENNA, Mo., June 13th, 1874.

Three months after date I promise to pay to the order of Johnson and Rittenhouse the sum of fifteen dollars for value received, negotiable and payable without defalcation or discount, and with interest from date, at the rate of ten per cent per annum, and if the interest be not paid annually, to become as principal and bear the same rate of interest.

" P. H. AMMERMAN,

"Executor of last will of James Johnson, deceased."

It has been repeatedly held that an administrator can maintain an action in his own, individual name, on a note made payable to him "as administrator, etc.," or "as executor, etc.;" the words "administrator, etc.," being mere words descriptive of his office or title to be rejected as surplusage or as *descriptio personæ*.

No reason is perceived why this rule of construction should be departed from in the present instance, especially when the notes themselves contain no words indicating an intention or purpose to charge the assets of the intestate with their payment. If such had been the intention of the parties, or the maker of the note, it could easily have been expressed on the face of the paper, and in the absence of such an expression it cannot be inferred.

The notes show that the amounts named therein were to be paid at a future day with a rate of interest agreed upon, with which the defendant had no right in his capacity of executor to charge the estate, by his own personal obligation. Such a writing from these facts alone appearing upon it might well be construed to be the personal undertaking of the executor. 2 Will. on Ex'rs 1613. If the notes are to be regarded as the individual notes of the defendant, then it is said the promise to pay is without consideration. The notes import a consideration, and it was for the defendant to show that they were given without consideration. For this purpose it would have been competent for defendant to show that, at the time the notices were published by Johnson and Rittenhouse at his request, the estate alone was to be looked to for the work done, and in the absence of such proof the publisher might well look to him for payment, and his promise to pay would be supported by sufficient consideration.

It is said in 1 Pars. on Bills, 161, that an administrator can only bind himself by his contracts; he cannot bind the assets of the deceased. If he make, indorse, or accept negotiable paper, he will be personally liable even if he adds to his own name the name of his office, as signing for example: "A, as an executor of B," for this will be only part of his description, or will be rejected as surplusage. But if he choose to exclude his personal liability expressly as by the words, "I promise to pay out of the assets of C. D. and not otherwise, then he is only bound as far as the assets extend." In the case at bar the executor could have limited his liability to the payment of the debt out of the assets of the estate. This, however, he has not done and the contract must be enforced as he has made it, and under it the only judgment which could have been rendered was a judgment *de bonis propriis*.

In the case of *Wooldridge v. Draper*, 15 Mo. 327, an analogous principle is recognized. It is there held that when an administrator sues upon a contract where the cause of action accrued to the intestate during his life-time, and fails in the action, the judgment for costs will be *de bonis testatoris*; but where the cause of action accrues to the administrator after the death of the intestate, and he sues and fails to recover, judgment for costs will be rendered against him *de bonis propriis* in his personal character. In such case, however, on a proper showing to the probate court having the estate in charge, he may be allowed his costs out of the assets of the estate. So in the case at bar *Johnson and Rittenhouse*, the publishers, had a right to look to the executor for the costs of publishing the notices, and the executor a right to look to the assets of the testator. In this particular the case we are considering is distinguishable from the cases to which we have been cited; for in most of them the promise of the executor or administrator related to the payment of debts created by the testator or intestate in his life-time, and in such cases it has been held where there were neither assets, nor forbearance on the part of the creditor, the promise could not be enforced for want of consideration.

We think the judgment on the facts of the case was rendered for the right party and it will therefore be affirmed, which by the concurrence of the other judges is hereby done.

Judgment affirmed.

EX PARTE JILZ.

(64 Mo. 206.)

Habeas corpus — re-arrest.

A discharge on *habeas corpus* is conclusive and not appealable, and the prisoner cannot be arrested again for the same offense.

HABEAS CORPUS. The opinion states the facts.

Chas. P. Johnson and *H. B. Wilson*, for respondent, cited *Yates v. Lansing*, 9 Johns. 395; *Yates v. People*, 6 id. 335; *Case of Yates*, 4 id. 318; *Yates v. Lansing*, 5 id. 282.

C. C. Simmons, with *R. S. McDonald*, for petitioner.

NORTON, J. The petitioner, on the 12th of August, 1876, was tried in the St. Louis court of criminal correction and was convicted of criminal abortion, and was sentenced by said court to imprisonment in the St. Louis county jail for the term of one year and to the payment of a fine of \$500. Under said sentence he was committed to the jail of said county, and there remained until the 22d day of August, 1876, when he applied to JAMES J. LINDLEY, a judge of the Circuit Court of St. Louis county, for a writ of *habeas corpus*, which was by said judge issued, and on a hearing of the same the said Jilz was discharged from his said imprisonment on the same day, on the ground that the court of criminal correction had exceeded its power in sentencing him, Jilz, to confinement in the county jail of St. Louis county for one year, and that the sentence under it and the commitment were void. After said Jilz was thus discharged, he was again, on the 29th day of September, 1876, re-committed to the jail of St. Louis county on a re-issue of the same commitment upon which he was originally imprisoned, and from which he had been discharged by Judge LINDLEY :

Petitioner Jilz now seeks to be discharged from this last imprisonment on the following grounds:

1st. Because the judgment and sentence of said court of criminal correction was void, in this, that, under the law applicable to

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St. Louis county, said court only had jurisdiction to sentence him to an imprisonment for the period of six months in the city work-house of the city of St. Louis;

2d. Because having been once discharged on *habeas corpus* by Judge LINDLEY, who had power to hear and determine the legality of his imprisonment, his re-arrest and re-imprisonment on the re-issue of the same commitment were illegal and void.

If the second reason assigned by petitioner for his discharge be well founded, it will dispense with a consideration of the first. Our attention will therefore be directed to it.

It is not denied but that Judge LINDLEY had the legal right to issue the writ of *habeas corpus* which was issued by him on the 26th day of August, 1876. If the circuit judge had power to issue the writ—which is conceded—such judge acquired jurisdiction over the subject-matter, when the office of the writ had been partially performed, in bringing before him the prisoner with the cause of his detention and imprisonment.

In the case of *Martin v. The State*, 12 Mo. 474, where one Jackson was imprisoned by virtue of an indictment found in the criminal court of St. Louis county, and not having been brought to trial at the end of the second term after the indictment was found, he was discharged on *habeas corpus* by a judge of the Circuit Court of St. Louis county from his imprisonment. Martin, the jailer, having him in custody, was ordered by the criminal court to retain Jackson in custody to answer the indictment, but disregarded the order of the criminal court and discharged Jackson in obedience to the order of the circuit judge. Martin was fined for contempt in disobeying the order of the criminal court, and appealed to this court from the judgment imposing the fine. In the disposition of the case it became necessary to consider the action of the circuit judge in discharging Martin, and Judge RYLAND, speaking for the court, observed: "The St. Louis Circuit Court, and the judge thereof, in vacation, had the power to grant and issue the writ. This gives to such court or judge jurisdiction over the matter; and though the statute expressly declares that 'no person imprisoned on an indictment found in any court of competent jurisdiction, or by virtue of any process or commitment to enforce such indictment, can be discharged under the provisions of this act, but may be let to bail if the offense be bailable, and if the offense be not bailable he shall be remanded forthwith,' yet this section does not take

away the jurisdiction, but orders and directs what shall be done. A circuit judge, therefore, discharging against this provision of the statute, may be considered as acting indiscreetly, even erroneously. Yet having jurisdiction over the subject, his order discharging must be considered a justification to the jailer in turning out the prisoner. * * * * The circuit judge having authority to issue the writ of *habeas corpus* (and this point the attorney for the State in his brief admits, but contends that all the subsequent acts of the judge are not only against but beyond his jurisdiction and are utterly void), his act afterward in discharging Jackson, the prisoner, although it may have been erroneous and contrary to law, yet it could not be said to be an act *coram non judice*."

So, also, in the case of *Ex parte Page*, 49 Mo. 291, it was held by this court "that Page, who had been convicted of grand larceny and sentenced to the penitentiary for ten years, was entitled to his discharge on proceeding by *habeas corpus*, on the ground that the judgment of the court sentencing him to ten years was void, because the highest punishment under the law was seven years for such offense."

Judge LINDLEY, of the Circuit Court, having thus acquired jurisdiction of the person and subject-matter, was authorized and required to determine the question as to the legality of the imprisonment, and whether he decided erroneously or not is immaterial, the discharge of the prisoner being in favor of personal liberty is final and conclusive. In proceedings by *habeas corpus* this court only exercises original jurisdiction, and, in issuing the writ and determining the questions arising under it, possesses no more power than is possessed by a circuit or county court, or any judge or officer authorized by law to issue the writ and authorized to remand, admit to bail or discharge the prisoner, according to the circumstances of the case.

In the case of *Howe v. The State*, 9 Mo. 690, it was held that an appeal from a judgment of the Circuit Court, refusing to discharge a prisoner on *habeas corpus*, would not lie to this court.

In case of *Ex parte Toney*, 11 Mo. 662, it was also held that "in deciding on the propriety of discharging a prisoner on *habeas corpus* this court exercises no appellate jurisdiction."

It would seem, therefore, that if a judgment of a Circuit Court refusing to discharge a prisoner was conclusive, or not subject to be reviewed on appeal, a judgment of a court or judge discharging

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a prisoner ought in like manner to be conclusive, especially when the statute expressly provides that "no person who has been discharged by the order of any court or magistrate upon a writ of *habeas corpus*, issued pursuant to this chapter, shall be again imprisoned, restrained and kept in custody for the same cause," etc. Gen. Stat. 629, § 55.

The case of *Yates*, 4 Johns. 318, is very analogous in some of its features to the case at bar, and the questions involved were most ably and thoroughly discussed. *Yates* was committed to jail by a court of chancery for contempt of court. He applied to Justice SPENCER for a writ of *habeas corpus*, and was by him discharged. After he was discharged the court of chancery ordered his arrest and imprisonment on the same charge. He applied to Justice SPENCER again for a writ of *habeas corpus*, and was again by him discharged. After this discharge he was again arrested and imprisoned on the order of the chancery court on the same charge. An application was subsequently made to the Supreme Court by *Yates* for a writ of *habeas corpus*, which was granted, and after a full hearing the prisoner was remanded to custody. He then sued out a writ of error, and the case was heard by the Court of Errors, and is reported in 6 Johns. 337. The decision of the Supreme Court in 4 Johns. was reversed by the Court of Errors and the prisoner discharged.

CLINTON, who delivered the opinion, concurred in by a majority of the court, considered the following points with others :

1st. Whether a judge in vacation had jurisdiction in the case ?

2d. Whether a person discharged on a *habeas corpus* can be re-imprisoned for the same offense :

In passing upon the two points, he observes : "A judge is certainly constituted a tribunal to pronounce upon the legality of a commitment. He is not to intermeddle when the prisoner is a convict or in execution by legal process — when he is detained by legal processes — out of criminal courts for some matter or offense not bailable. If a prisoner is brought before a judge on *habeas corpus*, who is to determine on the legality of a commitment ? Is he to take it for granted that every commitment of every court and magistrate for offenses not bailable is legal, and to remand the prisoner accordingly ? Will not this render the *habeas corpus* act of little value, and circumscribe its operation in a most pernicious manner ? The judge has jurisdiction, and, if he has juris-

diction, his judgment may be erroneous, but it cannot be void. If he decides that the process is illegal, he may err, and so may all courts, but erroneous judgments are not void but voidable. If, then, the judge had jurisdiction in the cause, whether he decided erroneously or not, is immaterial; his discharge being in favor of personal liberty is final and conclusive. He is, in that respect, a court of *dernier resort*." He also observes in speaking of the provision of the statute of New York, similar to our own, "that no person who shall be set at large upon any *habeas corpus* shall again be imprisoned for the same offense, unless by the legal order or process of the court wherein he is bound by recognizance to appear, or other court having jurisdiction of the cause.

This provision appears to set this branch of the inquiry at rest. It is the same as in the English statute, and evidently refers, when speaking of the court where the prisoner is bound to appear or a court having jurisdiction of the cause, to the case of persons bound to appear and answer for crimes in criminal courts. If the right of the imprisonment is sustained in other cases, the benefits of the writ of *habeas corpus* may be greatly evaded if not completely nullified. I consider it, therefore, of great importance to personal liberty to resist this extraordinary doctrine. Abuses may indeed occur in the exercise of the powers of a judge under the *habeas corpus* act, but if he errs in favor of personal liberty, he errs on the safe side, and his decision ought not to be called in question. That any re-commitment in this case is illegal, I think cannot be doubted. The prisoner was discharged from custody, and the judgment of the Supreme Court remanding him to imprisonment was reversed by the Court of Errors.

The conclusion arrived at in the case of Yates was reached after a most thorough and searching investigation by some of the ablest and most learned judges of that day, and commends itself to our favorable consideration as being in consonance with the justice of the case and sound logic. In the light, therefore, of the cases above cited, as well as the provisions of our statute regulating proceedings of this character, and expressly prohibiting the re-arrest and re-commitment of a prisoner after being discharged by a court or officer having jurisdiction of the person and authority to act in regard to the subject-matter, the re-arrest and re-commitment of Jilz by the St. Louis court of criminal correction was unauthorized and his imprisonment thereunder illegal. It is no argument against

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this conclusion to say that a judge or officer authorized to issue this writ of right may commit a mistake and release from confinement a citizen who ought not to be released. Under any system of jurisprudence, no matter how perfect and complete it may be, mistakes will sometimes be made and errors committed. Questions of law or fact, whether the determination of them be confided to the court or jury, owing to the imperfections incident to all human reasoning, are often improperly and erroneously determined, yet when they are determined by those who are by law intrusted with their determination, that is an end of the matter. If, even, as in this case, a person convicted of a misdemeanor, brutal in its character, and which shocks the moral sense of the whole community, should be entitled to his discharge by reason of any error committed, it is better that it should be so than that a principle should be recognized or a rule laid down which would practically render the writ of *habeas corpus* a nullity, and bring into constant danger and peril the liberty of the citizen.

[Omitting some unimportant remarks.]

For the reasons expressed herein, we think the prisoner is entitled to a discharge from the imprisonment of which he complains, and with the concurrence of the other judges will be so ordered.

HENRY, J. I fully and heartily concur in the foregoing able opinion, and hold that the judgment of Judge LINDLEY, discharging Jilz from the custody of the jailer, was final and conclusive, and that neither the court of criminal correction, nor any other court in the State could re-commit him on the original sentence.

The position of the counsel for the State, and the ground necessarily taken by any one holding that the action of the court of criminal correction was proper, is that, although the statute authorized Judge LINDLEY to issue the writ, and when Jilz was brought before him he acquired jurisdiction of his person and of the cause, yet he had no jurisdiction to discharge him, unless he should decide properly the legal questions involved. In other words, if the sentence pronounced by the court of criminal correction was right, Judge LINDLEY had jurisdiction to re-commit, but none to discharge Jilz, and Judge Cady had the right, and it became his duty to disregard the order of discharge and re-commit him.

In the *Matter of DaCosta*, 1 Park. Crim. Cas. 129, it was held by the Supreme Court of New York, that "the principle of *res adju-*

dicata is applicable to proceedings upon *habeas corpus*." That was a case in which the petitioners had been remanded to the custody of the person who held them, but the principle of that is none the less applicable to this case. Our statute gives the prisoner this writ as often as he may find a court or officer superior to the one to whom he last made his application, authorized to issue it. In his petition he is required to state, "that no application for the relief sought has been made to or refused by any court, officer or officers, superior to the one to whom the petition is presented."

In the case of *DaCosta, supra*, the observation of Senator PAIGN is quoted and approved that "if a final adjudication upon a *habeas corpus* is not to be deemed *res adjudicata* the consequence will be lamentable. This favored writ will become an engine of oppression instead of a writ of liberty."

In the same case (*Mercein v. People ex rel. Barry*, 25 Wend. 64) the chancellor delivering the opinion also held that "the principle of *res adjudicata* was applicable to a proceeding upon *habeas corpus*."

Neither the Court of Appeals nor the Supreme Court exercises appellate jurisdiction when it issues this writ, and its judgment, in this proceeding, is of no more force or validity than that of a justice of the county court, or a circuit judge.

In *Ex parte Toney*, 11 Mo. 662, Judge NAPTON observed that "in deciding on the propriety of discharging a prisoner on *habeas corpus*, this court exercises no appellate jurisdiction. In the exercise of this power it is confined within the same limits which would restrain a judge of the circuit or county court in its exercise. It can give no other or greater relief than is afforded by these officers. If the idea of all appellate jurisdiction is discarded, it will be obvious that neither this court, nor any other court nor officer, can investigate the legality of a judgment of a court of competent jurisdiction by a writ of *habeas corpus*. If the court has jurisdiction of the subject-matter and of the person, although its proceedings may be irregular or erroneous, yet they cannot be set aside in this proceeding. The party must resort to his writ of error, or other direct remedy, to reverse or set aside the judgment, for in all collateral proceedings it will be held to be conclusive."

The court held in that case that Toney was not entitled to his discharge, and remanded him to the custody of the warden of the penitentiary; but suppose it had determined otherwise, was there

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any authority in the court, in which Toney was convicted and sentenced, to re-commit him, in defiance of the mandate of this court whether it erred or not? Could the inferior court have reviewed and reversed the judgment of this court? When the court says: "Although its proceedings (proceedings of the court in which the conviction was had) may be irregular or erroneous, yet they cannot be set aside in this proceeding," it was not passing upon the effect of a judgment upon a *habeas corpus* discharging the prisoner, but announcing a rule by which courts, or officers issuing the writ, should be guided in determining what judgment to render.

If the doctrine of the *Toney* case be correct, and we fully indorse it, the court of criminal correction, if Jilz had sued out his writ in this court instead of the Circuit Court, and been discharged, could have re-committed him, and repeated the commitment as often as any court should, on *habeas corpus*, order his discharge, unless such order regularly issued were a finality. If we now discharge Jilz, what is to hinder the court of criminal correction from re-committing him, if the doctrine contended for be the law? And if this be the law, of what value is the writ of *habeas corpus*? The judge of the court, acting in a judicial capacity, would not be liable to the penalty prescribed by the statute, and if he were, what is the penalty a hundred times recovered, in comparison of the personal liberty of a citizen?

But, it may be said, a county court justice may issue the writ and discharge one convicted of a felony, and sentenced to the penitentiary, by a Circuit Court. If this be so, the mistake was in authorizing such inferior courts to issue this writ, but far better were it that nine hundred and ninety-nine of every thousand guilty men should escape under this process, than that a writ, which in the past has accomplished so much for personal liberty, should be rendered inefficacious by judicial construction or legislative enactment.

It is the most celebrated writ known to our law, and has received such encomiums as have been pronounced upon no other judicial process belonging to ours or any other system of jurisprudence. Its origin is so far back in antiquity that its date cannot now be ascertained. It is older than *Magna Charta*, and for centuries has been held by Englishmen as the bulwark of their liberty, and is so highly esteemed by the people of the United States that it has been embalmed in the Federal Constitution, and in the Constitu-

tion of every State in the Union; and yet if the position of the counsel for the State be correct, it is of less value than a writ of replevin, or a *feri facias*; for these do what they are designed to accomplish, while an inferior court can set at naught the judgment of the highest judicial tribunal of the land discharging one restrained of his liberty, and the victim of judicial oppression has no remedy but to resort again to his *habeas corpus*, again to be committed if such inferior court shall deem, or feign to believe, the judgment discharging him erroneous. With what propriety could it be denominated "the great writ of liberty," if this be the law? When, then, would a citizen illegally restrained of his liberty get his final discharge on a *habeas corpus*.

This is no time to compare the efficacy of this writ. Now, more than ever before, should we be careful to preserve the "this dearest birthright of Britons," as, more than a century ago, it was characterized by the English colonists in America. No prison walls should be strong enough, against its mandate, to hold one for whom it issues, nor any judge or court too great to bow in submission to the judgment rendered in the proceeding by a tribunal authorized to issue the writ of *habeas corpus*.

I think that the prisoner is entitled to his discharge.

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(64 Mo. 218.)

Practical location of boundaries.

Where the division line between two adjoining estates is indefinite or uncertain, the owners may effectually agree upon the true boundary, and the line thus ascertained will control their deeds.

A jury may infer a practical location of a disputed boundary line by agreement, from long acquiescence, less than the period necessary to constitute adverse possession, and from acts and declarations of the parties. (*See note, p. 239.*)

EJECTMENT. The opinion states the facts. Defendant had judgment, and plaintiff appealed.

Glover & Shepley, for appellant.

B. A. Hill, for respondents.

HOUGH, J. This was an action of ejectment, brought by the plaintiff against the defendant, in January, 1865, to recover possession of a lot of ground in the city of St. Louis, being part of what was known as the Clamorgan field lot, in the St. Louis common fields, and lying between Thirteenth and Fourteenth streets, on the north side of Washington avenue, with a front of seventy-five feet on said avenue, and a depth of one hundred and fifty feet.

The defendants pleaded not guilty and the statute of limitations.

This case was before this court on a former occasion, and the decision then rendered will be found reported in 42 Mo. 13. The case is one of disputed boundary, and the controversy grows out of the following facts:

In the year 1821, Jeremiah Connor was the owner of a tract of land supposed to be forty arpents in length from east to west, and one in depth, which was confirmed to one Clamorgan; also another tract of the same dimensions adjoining it on the south, confirmed to one Bissonet, the two making, when taken together, a tract of 2x40 arpents.

On the 20th day of October, 1823, John O'Fallon bought of Connor, through the sheriff, the west half of the entire tract of 2x40 arpents.

On the 1st day of November, 1823, Peter and Jesse G. Lindell bought of Connor, through the sheriff, all that portion of the Clamorgan arpents lying west of Eleventh street, and bounded on the west by the tract bought by O'Fallon, being about 1,100 feet in length, east and west, and supposed to contain between five and six arpents.

On the 29th day of June, 1824, Jacob Fry bought of Connor, through the sheriff, all that portion of the Bissonet arpents lying west of Eleventh street, and bounded on the west by the tract purchased by O'Fallon, and on the north by the tract purchased by P. and J. G. Lindell.

The evidence tends to show that the tract purchased by Fry was surveyed and staked off before it was sold, and a stone set up at his south-west corner. This point was ascertained to be on the western line of Fry's purchase by marking off twenty arpents from the eastern extremity of the tract, it being supposed at that time that the entire tract was only forty arpents long. Fry immediately erected a fence on his western line thus ascertained, and that line

was then and for a long time afterward considered the center line of the 2x40 arpents.

On October 13, 1824, O'Fallon sold and conveyed to J. B. C. Lucas 1x2 arpents, that is, one arpent in the Clamorgan tract and one arpent immediately south of it on the Bissonet tract, the two being bounded on the east by the tracts purchased of Connor by P. and J. G. Lindell and Jacob Fry. The Fry tract was then inclosed and O'Fallon sold to Lucas by Fry's fence as his eastern boundary.

Fry died in 1824, and on the 8th day of May, 1827, the Lindells purchased of Fry's administrator the tract purchased by Fry of Connor.

In 1828, or 1829, the Lindells fenced what they supposed to be the ground purchased by them of Connor, by continuing the Fry fence northward and inclosing the north line of the Clamorgan tract.

In 1827 or 1829, O'Fallon sold to John and William Finney ten arpents in the west half of this 2x40 arpents, bounding the tract, so sold, on the east by the two arpents sold to Lucas, and on July 9, 1831, executed to the Finneys a deed therefor. When the Finneys purchased they located their eastern line, and erected a fence thereon about one arpent west of the Fry fence, thus leaving an open space of 1x2 arpents between their fence and the line of the Fry fence, which was claimed by Lucas. In 1830 or 1831, the Finneys surveyed their ground and replaced this fence with a more permanent one. In September, 1825, O'Fallon sold twenty-eight arpents, which was supposed to be the entire remainder of his west half of the 2x40 arpents, to one Slater, and the eastern boundary of this tract was also determined by the location of the Fry fence. In 1832 or 1833, the Lindells made a more permanent fence of cedar posts and oak rails, locating it a short distance further west than the original fence. The vacant space between the fences of the Finneys and the Lindells was claimed by J. B. C. Lucas as his property, until his death in 1842, when Washington avenue was opened on the line dividing the Clamorgan and Bissonet tracts, and the fences of the Lindells fell down and gradually disappeared. With the knowledge of the Lindells, Lucas exercised at all times the authority of an owner over this space. He purposely kept it open for his own convenience, as an outlet to the north; guarded it against trespassers, pastured his cattle upon it, and protected its

surface from washing. During all this time the Lindell fence was regarded by all parties as their western line. Lucas acquiesced in its location, adopted the same as his eastern line, and agreed to the location of the Finney's permanent fence one arpent west thereof, as his western line. Valuable improvements were made by the Finneys on their grounds so located, prior to the opening of Washington avenue in 1842. About this latter date, and prior thereto, the Lindells, in conversation with the Finneys and others, repeatedly spoke of Lucas as the owner of this vacant space. At the date of the several conveyances above mentioned, these lands were of comparatively little value, and the parties interested were unwilling to undergo the expense of a survey of the entire tract, in order to determine with accuracy the boundaries of the several parts thereof purchased by them. In 1845, however, parties claiming under Clamorgan seized the whole of the land occupied by the Lindells in the Clamorgan tract, and also that claimed by Lucas in said tract, and inclosed the same up to Finney's fence. A full survey was then made by the Lindells of the entire tract of 2x40 arpents, and the tract being longer than was supposed, its center line was found to be, not at the line of the Fry and Lindell fences, but further west and several feet within the Finney inclosure.

The Lindells thereupon asserted title to the whole of the land in the Clamorgan tracts from Eleventh street to the Finney fence, which included, of course, the north arpent of the 1x2 arpents claimed by Lucas. The lot in controversy lies on the east side of the north arpent claimed by J. B. C. Lucas, and the plaintiff claims under him. The defendant claims under the Lindells.

The Lindells sued the trespassers, claiming under Clamorgan, in forcible entry and detainer, and recovered judgment against them, and on the 22d day of October, 1852, were put in possession by the sheriff of all the land lying between Eleventh street and the Finney fence, being about thirteen hundred and fifty feet from east to west. To this suit, no one claiming under Lucas was a party. There was testimony tending to show that in the year 1854 the arpent claimed by Lucas in the Clamorgan tract was vacant, unoccupied and uninclosed, and the claimants under Lucas entered upon the same as owner and inclosed the entire arpent, except a small portion on the east side thereof which was marshy and partially covered with water, and held possession of the same for several years. This inclosure covered a portion of the land now in controversy. Conflicting

testimony was introduced by the respective parties as to the adverse occupancy of this arpent by the Lindells from the year 1852, until the institution of this suit, the details of which it is unnecessary to state.

In order to show an interruption of the possession relied on by the defendants under their plea of the statute of limitations, the plaintiff offered in evidence the record of an ejectment suit, instituted by the Lindells on the 19th day of February, 1856, against one Hannegan, to recover possession of the Clamorgan arpent, claimed by J. B. C. Lucas, the petition in which suit was sworn to by one of the plaintiffs. In that suit a representative of Lucas was admitted to defend.

At the October term, 1866, of the Circuit Court of St. Louis county, the suit was dismissed. Some time prior to that date, of course, the Lindells had regained the possession, as the present suit was instituted in 1865. The record was excluded by the court, and the plaintiffs excepted. On the 23d of October, 1854, the plaintiff sold the property in controversy, and repurchased it in 1859.

The foregoing epitome of the facts will suffice to present the points in controversy. The plaintiff asked the court to give the following instructions, which were given or refused as marked.

[Omitting some.]

No. 2. (Refused.) "If the jury find from the evidence that about the year 1827 or 1828 said Lindells located their western line at a fence which they put up as their western boundary and John B. C. Lucas assented to said location, and located his land by said fence as his eastern boundary, and both said Lindells and Lucas for a series of years (it might be less than twenty) acquiesced in and considered said location correct, and lived up to it, and treated it as correct in the uses of their lands respectively, and until Lucas, on the faith thereof, had expended labor or money on said land so located as his, with the knowledge and acquiescence of said Lindells, and until other persons, acquiring titles from O'Fallon west of Lucas, located their lands on the faith of the correctness of said western line of Lindells, and expended labor or money on the same, believing these locations correct, such facts, if the jury find them to be facts, constitute in law a valid, conclusive establishment of the said line between said Lucas and Lindells and those claiming under them, any thing in the deeds read in evidence to the contrary notwithstanding. And if the jury find the facts as set

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forth above, and that the premises in dispute lie within the tract conveyed by O'Fallon to John B. C. Lucas, and so located by said Lucas and Lindells, then they are instructed that the defendants have no defense to this action unless under the statute of limitations."

The court gave the following instructions for defendants. [Omitting some.]

No. 10. (Given.) "The deed from O'Fallon to Lucas, October 13, 1824, read in evidence by the plaintiff to the jury on this trial did not, at the time it was made, and does not now, so operate as to convey to the said Lucas any land situated in the eastern half of the general tract of 2x40 arpents of land, which did belong to J. Connor, under whom both parties to this suit now claim title; and if the jury find from the evidence that the premises now sued for are situated within the eastern half of said general tract of 2x40 arpents of land, then plaintiff has shown no title to the land sued for, by said deed to Lucas of 1824, or by virtue of any other deed read in evidence in this cause."

No. 11. (Given.) "The deeds and conveyances given in evidence in this case by defendant show a good, legal title in the legal representatives of Peter and J. G. Lindell to all the land within the east half of the general tract of 2x40 arpents of land, which did belong to J. Connor, under whom both parties claim title."

No. 13. (Given.) "The deeds and conveyances given in evidence by defendants, if they be true and genuine, show a good, legal title in the legal representative of Peter and Jesse G. Lindell, to all land in the east half the general tract of 2x40 arpents which did belong to Connor, under whom both parties claimed title, which lies west of Eleventh street."

No. 15. (Given.) "In order for the plaintiff to claim the benefit of an estoppel to pass the title of the land of P. and J. G. Lindell, the jury must find from the evidence that the Lindells acquiesced in a boundary line for twenty years prior to the 2d of February, 1847, and for ten years since that date."

There was a verdict and judgment for the defendants, which was affirmed at the General Term, and plaintiff has appealed to this court.

It will be seen from the foregoing statement that the plaintiff claims title to the lot in controversy by virtue of an alleged estoppel *in pais* as to the location of the eastern boundary of the 1x2

arpents, originating in favor of J. A. C. Lucas, under whom he claims, and against P. and J. G. Lindell, under whom the defendants claim.

This being an action of ejectment, the question which meets us at the threshold of our inquiry is, whether ejectment can in any case be maintained upon a right acquired by estoppel *in pais* in cases of disputed boundary. In other words, does an estoppel *in pais*, in cases of disputed boundary, create a legal or merely an equitable right to the real property affected by it?

Although the general principles by which we are to determine whether an estoppel *in pais* has arisen in any given case are the same whether the property affected thereby be real or personal, yet as the statute of frauds has been made the corner stone of every argument against the transfer by estoppel of a legal estate in real property, in determining the question presented it will be proper to exclude from our consideration those cases involving only the title to personal property, and such legal rights and interests as are not required to be evidenced by deed.

Nor will it be necessary to consider any of the numerous cases to be found in the books, affecting real property, which do not relate to the adjustment of disputed boundaries. The rule in cases of disputed boundary is based upon considerations peculiar to those cases.

The authorities are clear to the effect that if one, having the legal title to land, induce another to purchase the same from one who has no title, the legal title will not thereby pass to the purchaser, although the legal owner will not be permitted afterward to assert his title against such purchaser. Where equitable defenses are not allowed in actions at law, the purchaser may have to appeal to a court of equity.

But where one has the legal title to the subject-matter of a grant, the location or boundaries of which are doubtful or unascertained, and such person, and the proprietor of a coterminous estate, mentioned in the grant, establish and maintain their common boundary under such circumstances as will constitute a binding and conclusive identification of the subject-matter of the grant, an entirely different case is presented.

In a recent and able opinion by Judge COOLEY (*Hayes v. Livingston*, 34 Mich. 384; 22 Am. Rep. 533), in which the leading authorities on this subject are reviewed and classified, the doctrine

is advanced that the title to real property cannot in any case be passed by estoppel. Reference is there made to the cases in which the doctrine of estoppel has been applied to the voluntary adjustment of boundaries between contiguous estates, and those cases are distinguished by Judge COOLEY from the cases cited to support the rule announced by him, on the ground that "it is not supposed that in such cases the title is affected; the parties have only, by their agreement and conduct, determined the limits of their respective ownerships."

We cannot readily accept the foregoing ground of distinction as entirely satisfactory, if, as Judge COOLEY seems to concede, such voluntary adjustment of boundary lines is really effectual for the purpose of ascertaining and defining the subject-matter of a grant.

While it is true that in such cases the parties have "by their agreement and conduct determined the limits of their respective ownerships," yet it is also true that if the boundary agreed upon is not, in point of fact, the true boundary, the title must, to the extent of the discrepancy between the two, necessarily be affected. That is to say, the limits within which it is operative to confer a right will be enlarged or restricted, according to the agreement of the parties. In *Baldwin v. Brown*, 16 N. Y. 363, it was said that "it seems impossible to hold that a mere parol agreement, adopting a line different from that described in the deed, is obligatory, without violating the statute of frauds, both in its letter and spirit. It is said in some of the cases, by way of sustaining the doctrine, that the agreement does not transfer the title, but simply determines the boundaries of the land described, a distinction, the soundness of which may well be doubted. The supposition of such an agreement, in cases of long acquiescence in an established line, is, as I apprehend, entirely superfluous. The acquiescence in such cases affords ground, not merely for an inference of fact to go to the jury as evidence of an original parol agreement, but for a direct legal inference as to the true boundary line. It is held to be proof of so conclusive a nature that the party is precluded from offering any evidence to the contrary."

In this case it is quite apparent that a legal fiction is invoked, which practically extends the title to the established line, and at the same time avoids the intervention of the statute of frauds, which it is supposed would otherwise prevent such extension of

the title. The necessary consequence, however, of both of these decisions, which on this point are representative and not exceptional cases, is that the title conveyed extends to all the land included within the boundaries ascertained and fixed by the agreement of the parties in the one case, and by location and acquiescence in the other. If the boundary so fixed is to be conclusively regarded as the true boundary, of course the legal title must cover all the land within such boundary. *Vosburgh v. Teator*, 32 N. Y. 568.

This question was thoroughly examined by this court many years ago (*Taylor v. Zepp*, 14 Mo. 482; *Blair v. Smith*, 16 id. 273), and the conclusion was then reached, both upon principle and authority, that when the proprietors of contiguous estates, the boundaries of which are indefinite and unascertained, agree upon the line dividing their estates, the calls in their respective deeds fasten themselves upon the property to which they are thus applied, and the title passed by the conveyance covers and includes every part of the property so identified as being comprehended within the description contained in the grant.

In the case of *Taylor v. Zepp*, *supra*, as in the case at bar, the boundary was not fixed in the deed by monuments, courses and distances, and a boundary fixed by the agreement and acts of the parties was held to be conclusive. Judge NAPRON, who delivered the opinion of the court, used the following language: "It is said that this doctrine conflicts with the statute of frauds, but it has not been so regarded in any of the numerous cases decided on this point. Where the terms of the deed are ambiguous, there is clearly no ground upon which the statute of frauds can be invoked; but even where a well-defined boundary is given in the deed, we have seen that a different one may be established under circumstances which will conclude the parties from contesting it. This is only analogous to numerous other doctrines, as well settled as the construction of the statute itself. Is not a title itself held to pass by estoppel? Have not the courts refused to permit the contents of a deed to be proved, when the grantee has destroyed it with a view to re-invest the title? Have not the owners of land transferred their title by standing by and permitting adverse possession, and the adverse proprietors to build and improve? The statute was made to prevent fraud, and the courts have not felt themselves called upon to adhere so closely to its letter as to facilitate and encourage the very evil it was framed to prevent. The truth is the

statute does not apply to such cases. The doctrine of estoppel is as old as the statute of frauds, and, as such, a part of the law of the land. It is no objection to either, that the one may be a modification or regulation (?) of the other."

In the case of *Blair v. Smith*, *supra*, the rule laid down in *Taylor v. Zepp* was followed and approved, and the following language was employed in giving expression to the opinions of the court: "The statute of frauds does not touch such a case as this. Here there is no sale of land to either party. There is no consideration passing from one to the other; it is not a contract either of buying or selling land from one to the other. They own adjacent lots—contiguous lots; they agree that such a marked line shall be the dividing line between the lots which they own; and they use and occupy the respective lots up to this line, not for twenty years, not for fifteen years, but for a length of time sufficient to show the understanding and the intention of themselves—to show that they know their own boundary, that they are content with their own boundary * * * "Now, this use and occupancy without disturbance, for a time, long enough for men to show that they know the boundary between their lands, shall be considered binding and conclusive as to such boundaries, as well as of such understanding or agreement between them.

"They shall not after a lapse of years, longer or shorter, as the circumstances may tend to show their agreement or settlement or the fixing of their common boundary, be permitted afterward to dispute it. Such boundary thus agreed upon shall be considered the true one; and each one considered as the owner of the land mentioned in his deed thus marked out to that boundary between them." See, also, *Boyd v. Graves*, 4 Wheat. 513; *Heirs of Houston v. Matthews*, 1 Yerg. 118; *Lewellen v. Overton*, 9 Humph. 76, which assert the same doctrine.

The reason of the rule thus established must, of course, confine its operation to cases of disputed or uncertain boundary. In all cases where the location of the true boundary is known to the proprietors of conterminous estates, and they attempt for mutual convenience or other sufficient reason to transfer land from one to the other by a parol agreement, changing the location of such boundary, the statute of frauds will inflexibly apply. *Nichol v. Lytle*, 4 Yerg. 456; *Gulchrist v. McGee*, 9 id. 455; *Yarborough v. Abernathy*, 1 Meigs, 413; *Vosburgh v. Teator*, 32 N. Y. 568.

We do not hesitate to hold, therefore, that where a disputed or uncertain boundary line has been conclusively settled by parol agreement, ejectment may be maintained for all the land included within the call of the deed, as located and determined by the agreement and conduct of the parties fixing the boundary; and it has been so held in the case of *Spears v. Walker*, 1 Head, 166; *Tarrant v. Terry*, 1 Bay, 239.

The question next to be considered is whether there was any testimony from which the jury would have been authorized to find or infer the existence of an agreement between Lucas and the Lindells, establishing their common boundary at the line of the Fry and Lindell fences. There can be no question, we think, but that the boundaries called for in the conveyances were of that nature that they might properly be made the subject of voluntary adjustment by the parties.

As stated in *Taylor v. Zepp*, *supra*, it has been held that they may be so adjusted even when the boundary is defined in the deed by courses and distances. Lucas and the Lindells were all dead when this cause was tried, and no testimony was introduced to show any *express agreement* between the parties as to their common boundary. But there can be no controversy about the fact that the Lindells did in 1828 or 1829 erect a fence on what they supposed to be their western line. Nor can there be any controversy about the fact that Lucas, regarding this location made by the Lindells to be correct, acquiesced in the same, and agreed to the survey made by the Finneys in 1832-3, and the location of their permanent fence made in accordance therewith, fixing their eastern and his western line. The further fact is not disputed, that the area originally left between the Finney fence and the Lindells was slightly in excess of the arpent, and that when the Lindells erected their permanent fence in 1832-3, they located it a few feet west of the fence first erected by them, thereby reducing the open space between their fence and the Finney fence to one arpent in width, the amount claimed by Lucas. It is not denied that Lucas, from the date of his deed, in 1824, to the day of his death, in 1842, with the knowledge of the Lindells, exercised acts of ownership over this vacant space, and claimed it as his own. He protected it against trespassers, pastured his cattle upon it, improved its surface, and paid taxes upon it. And there was evidence to the effect

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that one of the Lindells being upon the land, declared Lucas to be the owner of it, and stated that he had tried to buy it, but could not. Lucas kept this ground vacant as a "look-out" to the north, and as a means of egress northward to the St. Charles road from his residence, which was immediately south of it. It is not denied that the Lindells, prior to their discovery, in 1845, that the line of their western fence was not in fact the true line, constantly recognized this arpent to be the property of Lucas, and did, on various occasions, and to various persons, so declare themselves.

It is strenuously contended, however, on behalf of the defendant, that, as the location of the Lindells' west line was made by them in ignorance of their true boundary, they were not guilty of any fraud, concealment, or willful misrepresentation, intended to deceive Lucas, and by which he was deceived and misled to his injury, and that therefore they are not estopped from claiming to their true line.

This is not a case involving the general doctrine of estoppel, so ably and learnedly discussed by the distinguished counsel for the defendant, and if it were we should be disposed to take issue with his statement of the law on that subject. The rigid rule, laid down in *Pickard v. Sears*, 6 Ad. & El. 469; *Boggs v. Merced Mining Company*, 14 Cal. 279, and kindred cases, has been somewhat qualified by more recent adjudications. But the question here is, whether the testimony relating to the practical location of the boundary lines between Lucas and the Lindells, in 1828 or 1829, and their acquiescence in the same for a period of nearly seventeen years, together with the declarations and conduct of the parties in reference thereto, was sufficient to warrant the jury in inferring therefrom an agreement between the parties establishing such line. We think it was.

In *Rockwell v. Adams*, 7 Cow. 761, SUTHERLAND, J., said: "Now I apprehend that it is not necessary, in order to make an actual practical location control the courses and distances in a deed, that the party making such location, or subsequently recognizing it, should in all cases know that the effect of it would be to give him less land than he would otherwise be entitled to, nor that there should be an *express agreement* to abide by such line. An acquiescence for a length of time is evidence of such agreement. When the line has been acquiesced in for a great num-

ber of years by all the parties interested it is conclusive evidence of an agreement to that line."

In *Baldwin v. Brown*, 16 N. Y. 363, *supra*, it was held that such acquiescence was conclusive evidence, not of an agreement but that the boundary fixed was the true boundary. This, as we have before seen, was upon the theory that no valid parol agreement could be made in such cases—a doctrine which does not obtain in this State.

In *Dibble v. Rogers*, 13 Wend. 539, referring to the charge of the judge to the jury in the trial court, it was said: "He instructed them that a long acquiescence in an erroneous location by the plaintiff would authorize them to find that the plaintiff had agreed to a location different from that given by his deed; and whether he knew his rights or not, such location or acquiescence would conclude him; and if the jury were satisfied that the plaintiff had agreed to such a location (of which his long acquiescence in the location contended for by the defendant was evidence) that they would find for the defendants, otherwise for the plaintiff. This is the rule of law laid down by this court in *Rockwell v. Adams*, 7 Cow. 762; and again, after a second argument, in the same case, in 6 Wend. 467. It is believed that the authorities referred to in those cases fully sustain the principle. See 1 Caines, 363; 3 Johns. 8, 269; 7 id. 245, per VAN NESS, J.; 8 id. 367; 9 id. 100; 17 id. 29. It has again been recognized in the recent case of *McCormick v. Barnum*, 10 Wend. 104; and in *Kip v. Norton*, 12 id. 130. The acquiescence in those cases varied from the period of 17 to 40 years. In this case it was about twenty years. Those cases also show that the *acts* and *declarations* of the parties are competent evidence upon the question of location.

In *Jackson v. McConnell*, 19 Wend. 176, it was held that acquiescence was evidence of an agreement, but no conclusive evidence unless continued for a great number of years. The rule announced in the foregoing cases was approved in *Blair v. Smith*, *supra*, and *Taylor v. Zepp*, *supra*.

It follows from the foregoing authorities, that the defendants' instructions number 10, 11, 13, and 15, should not have been given. Plaintiff's instruction number 2 needs some modification to make it conform to the views expressed in this opinion.

[Omitting the question of adverse possession.]

It necessarily follows that the judgment of the Circuit Court,

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both at General and Special Term, must be reversed and the cause remanded for a new trial.

Judges NAPTON and SHERWOOD concur. Judges NORTON and HENRY were not on the bench when this case was argued.

Judgment reversed.

NOTE BY THE REPORTER.—The law on the subject of practical location of division lines seems to have been earlier and more carefully examined in the New York decisions than in any other State. As the subject is one of great practical importance, we have thought that a review of those decisions might be useful as an adjunct to the learned treatment of the subject in the principal case. The subject is naturally divisible into the heads of Acquiescence and Agreement.

Acquiescence.—In the earliest case in New York is *Jackson v. Bowen*, 1 Caines, 368, A. D. 1808. It was decided that an adverse possession of more than twenty years was a bar to a recovery in ejectment. The court remarked that if a man was mistaken in respect to his title, but, under circumstances showing no suspicion of imposition or ignorance, acquiesced in a possession by another in hostility to it, for the length of time shown in this case, he ought to be concluded. That length of time in this case was thirty-six years.

In *Jackson v. Dysting*, 2 Caines, 198, A. D. 1804, the plaintiff's lessor and the defendant's predecessor had forty years before employed two surveyors to run a line between them, and the defendant's predecessor by parol agreed to remove his fence to the line which the surveyors found, but there was evidence of a subsequent parol agreement between the plaintiff's lessor and the defendant, in effect rescinding that agreement. This second agreement was, that if a suit between Klock, defendant's predecessor, and Willis should be decided in favor of Klock, the defendant was to give up possession without suit; but if Willis prevailed, the plaintiff's lessor was to abandon his claim. No evidence as to the event of that suit was given. Judge SPENCER thought the first parol agreement binding, but held it rescinded by the second; that the plaintiff was bound to show the result of that suit; but he held the acquiescence of forty years to be conclusive in favor of the defendant. Judge LIVINGSTON held the first agreement invalid, because it was not acted on, but agreed with SPENCER as to the acquiescence. Judge THOMPSON held the first agreement not affected by the statute; that the second agreement had nothing to do with the case as it stood, or that the defendant should have chosen the result of the suit; and that the plaintiff was entitled to recover. Judgment of nonsuit.

In *Jackson v. Vedder*, 3 Johns. 8, A. D. 1808, it was held that, where a partition had been made, with a survey and a map, and possession had been taken accordingly and held for forty years, the parties were concluded from contesting the correctness of the actual location.

In *Jackson v. Dieffendorf*, 3 Johns. 269, A. D. 1808, it was held, that, where a location had been made under a deed and survey, and undisturbed possession held accordingly for thirty-eight years, it should prevail, although subsequently made to appear inaccurate.

In *Jackson v. Ogden*, 7 Johns. 238, A. D. 1810, the grant was uncertain and ambiguous as to location, but there had been an acquiescence of seventeen or eighteen years, during which the land had been cultivated and become valuable. The plaintiff also had purchased under defendant's title, taking a deed recognizing the lines thus located. A majority of the court held this to be conclusive. But Judge VAN NESS dissented, holding that the grants conferred no title on the defendant, and that such a length of possession was not sufficient to make title. He says, at page 245: "The extent which we have hitherto gone to, that when two persons already having a title have settled the line of division between them, or when one having title has made an actual location, according to what he supposed to be his true line, and his neighbors have acquiesced in such location for a considerable length of time, the boundary thus estab-

lished shall remain undisturbed. But in this case my brethren go greatly beyond the principle of our former decisions."

In *Jackson v. Douglass*, 8 Johns. 367, A. D. 1811, where there was no uncertainty as to the true location of two adjoining lots of land, the single fact that one of the plaintiff's lessors, eight years before, had pointed out a mistaken line, which was fenced accordingly, was not sufficient to conclude the plaintiff.

In *Jackson v. Gardner*, 8 Johns. 394, A. D. 1811, it was held that, where A. voluntarily surrendered a lease and took a new lease, and afterward claimed under the old lease, he could recover no more land than what he could prove with absolute certainty was covered by the old lease; especially after the premises claimed had been in possession of another for sixteen years, who had made valuable improvements.

In *Stuyvesant v. Tompkins*, 9 Johns. 61, A. D. 1812, there was a crooked fence between the parties, which the plaintiff proposed to the defendant to straighten. Accordingly the plaintiff employed a surveyor, who, to the knowledge of the defendant, and without objection on his part, ran a straight line. The plaintiff removed the fence to this line, and the defendant pulled it down. The plaintiff brought trespass. The defendant showed that he and his ancestors had been possessed of the *locus in quo* for more than twenty-five years, and that during all that time the crooked fence had been the boundary. Also, that before the plaintiff's removal of the fence he objected to it. The plaintiff was defeated.

In *Jackson v. Smith*, 9 Johns. 100, A. D. 1812, it was held that where a survey was made by the direction, and under the observation of the grantee, he cannot, after the lapse of twenty-six years, vary the location. The grant in question was "for the use of the gospel," but the court do not seem to lay any stress on the peculiar sacredness of the purpose.

In *Jackson v. McCall*, 10 Johns. 377, A. D. 1813, it was proved that the immediate predecessor of the lessor of the plaintiff had repeatedly confessed that he was present when the line was run by the king's surveyors, and that the line set up by the defendant was the one he referred to. This line had been recognized on both sides for forty-one years. Held, conclusive against the plaintiff.

In *Jackson v. Van Cortear*, 11 Johns. 127, A. D. 1814, the parties had made a new survey, and agreed on the line run thereon as the true boundary. Positive acts of acquiescence were shown, and after nineteen years the line thus established was held conclusive. But this was expressly placed on the ground of the agreement.

In *Jackson v. Freer*, 17 Johns. 29, A. D. 1819, the proprietors of the patent had partitioned the same by actual survey, and the lot in question had been improved more than twenty years, and the defendant had possessed it fourteen years. A verdict for defendant was sustained. The decision was placed on the ground of the original agreement.

In *Rockwell v. Adams*, 7 Cow. 761, A. D. 1837, action of replevin, tried in 1835, it does not appear how long the acquiescence had been. The lands were wild, and no occupation was shown except cutting of timber, and there had been no agreement as to the line. But the court held that where the line has been acquiesced in for a great number of years, by all the parties interested, it is conclusive evidence of an agreement to that line; citing *Jackson v. Bowen*, *Jackson v. Vedder* and *Jackson v. Diefendorf*. and adding, "In each of these cases erroneous locations had been made, and they had been acquiesced in (not with a full knowledge that they were erroneous, but under a belief that they were correct, for from thirty to forty years." The court also held that an actual practical location will control, although the party does not know that its effect will be to give him less land than he would otherwise be entitled to, and that there need be no express agreement to abide by the line. And the court then adopt and sanction VAN NESS' dissenting opinion in *Jackson v. Ogden* as the true rule. The verdict for defendant was set aside. The action was tried again in 1836 (6 Wend. 467, A. D. 1821), and eleven years' acquiescence was shown. The plaintiff had a verdict. Chief Justice SAVAGE said the question was the same as in 7 Cowen, adopted the law there laid down, and denied a new trial. From this decision error was brought, and the case came up again in 1836, before the Court of Errors (16 Wend. 235), and this is the starting point back to which all subsequent decisions go. Chancellor WALWORTH laid

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down this rule: "Where there can be no real doubt as to how the premises should be located, according to certain and known boundaries described in the deed to establish a practical location different therefrom, which shall deprive the party claiming under the deed of his legal rights, there must be either a location which has been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations in relation to real estate; or the erroneous line must have been agreed upon between the parties claiming the land on both sides thereof; or the party whose right is to be thus barred must have silently looked on and seen the other party doing acts, or subjecting himself to expenses, in relation to the land on the opposite side of the line, which would be an injury to him, and which he would not have done if the line had not been so located, in which case, *perhaps*, a grant might be presumed *within* the twenty years." Senator MAISON in a long and elaborate opinion reviews all the cases, and concludes that possession for less than twenty years had never been held a bar, except in three cases, namely: *Ogden, Van Corlear and Gardiner*. He lays down the rule "that where the boundaries in the deed are clear and unambiguous and the land thereby described can be easily, and without doubt or conjecture, ascertained, no acquiescence or recognition, however unequivocal or often repeated, can have the effect of depriving the party of his possession of land, unless that acquiescence be continued in for at least twenty years." He continues: "When lands have been located, and such location acquiesced in for any time less than twenty years, either with or without agreement, and during the continuance of such acquiescence, with the knowledge and assent of the party, but without objection, buildings are erected and improvements made on the land thus possessed, the owner of the fee will, nevertheless, at law, be entitled to recover his land, but the party building or improving is not remediless; full and perfect relief and protection is afforded him in chancery," namely, by a perpetual injunction against the action at law. A new trial was granted with but one dissenting voice.

Intermediate 6th Wendell and 16th Wendell, the case of *McCormick v. Barnum*, 10 Wend. 104, was decided in 1833. Here it was held that an owner of land was bound by a division line, recognized by his surveyor as correct, where the owner has given deeds in conformity to a map and field book made by the surveyor, and no efficient attempt is made for twenty-two years to correct the line. Also, *Kip v. Norton*, 13 Wend. 137, in 1834, in which mere acquiescence for five years was held inconclusive. Also, *Dibble v. Rogers*, 13 Wend. 536, in 1835, in which the court held an acquiescence of twenty years conclusive.

Clark v. Welch, 19 Wend. 320, A. D. 1838, decided that where, in a description in a deed, course, distance and monument are given, the premises must be located according to the deed, and all parol evidence of the intent, acts and declarations of the parties, going to establish a different location, is inadmissible as contradicting or varying the deed, unless a possession be shown under claim of title for such a length of time as will bar a recovery in an action of ejectment. If, however, doubt or uncertainty exist, owing to the vagueness or obscurity of the description, or the decay or destruction of the monument, such evidence is admissible in aid of the deed. An actual location by *agreement* different from the deed will be obligatory. Judge COWEN says the defense of title by acquiescence for less than the statutory period is in the face of the statute of frauds, and also contravenes the doctrine of parol evidence. It would seem at first sight that Judge COWEN does not exactly know what to do with *Adams and Rockwell*, nor fully understand on what ground the reversal was there put, but inasmuch as the Supreme Court *were* reversed, he himself has no compunctions about "going back" on the doctrine overruled. On a closer examination we do not see that his doctrine differs from that of the court above.

The doctrine of "oral conveyance" seems to have been "laid," perhaps stunned, by Judge COWEN's tremendous and unanswerable onslaught, until 1853, when it "walked" again in *Clark v. Baird*, 9 N. Y. 183. This case decided, that, where a grantor at the time of the execution of the deed put the purchaser in possession, and pointed out the boundaries, but the boundaries so pointed out embraced land not included in the deed, occupation with the consent of the grantor for a less period than that required by statute to bar a right of entry gave the purchaser no title to the lands not covered by the deed. Judge COWEN's doctrine is expressly sustained.

Down to this time the conclusiveness of acquiescence had been based upon the notion that it was evidence of a *parol agreement* establishing the line. But this idea was exploded, in 1837, in *Baldwin v. Brown*, 16 N. Y. 369, which put the doctrine on the true ground, namely, that the acquiescence is conclusive evidence that the location is correct. It became material to decide this in answer to the argument that where the location was erroneous no bar could be inferred, because an agreement founded on a mutual mistake of facts is not obligatory. But the remark that "there may be cases in which an express agreement recognizing an erroneous boundary will conclude a party; as where the other party, acting upon the faith of such agreement, has made expensive improvements, the benefit of which will be lost to him if the line is disturbed," seems *obiter*. Acquiescence of more than forty years was shown in this case, and the court say: "The plaintiff is precluded, on principles of public policy, from setting up or insisting upon a line in opposition to one that has been steadily adhered to, upon both sides, for more than forty years."

Judge COWEN's doctrine was also approved in *Terry v. Chandler*, 16 N. Y. 368, A. D. 1837.

In *Reed v. Farr*, 35 N. Y. 113, A. D. 1866, which was a case of practical location and acquiescence for more than twenty years, the case of *Baldwin v. Brown* was followed and approved, and its reasoning adopted. See, also, *Jones v. Smith*, 64 N. Y. 130; *Stewart v. Patrick*, 68 id. 450.

In the same year the question was reviewed in a learned and exhaustive opinion, in *Hubbell v. McCulloch*, 47 Barb. 287. The plaintiff alone, more than twenty years before, ran an erroneous line through woods, on uncultivated and unimproved lands, having previously been told by the defendant that the defendant would abide by the line as he should find it, and having subsequently described it as run to the defendant, but the defendant not having assented to it, and it not being fixed or adopted. There being no adverse holding proved, this was held not to amount to a practical location, because there was no original agreement of minds, and no subsequent acquiescence except silence. The court say: "There has been in the early cases a good deal of confounding of possessions that began adversely, with this new method of getting round the statute of frauds, now called 'practical location;' but it is time that possession begun adversely and possession claimed to have begun under practical location, if there is any difference, should be in some way distinguished." The court find the origin of "practical location" in an acquiescence between the parties in a line known and understood by them, of such a length of time as to be identical with "time immemorial," or "time out of memory." "Rather than disturb such an ancient line, it was the policy of the law to presume a grant."

In *Reed v. McCourt*, 41 N. Y. 441, A. D. 1866, it was held that a *parol* assent as to the location of a boundary fence, and the actual erection of the fence, followed by mutual occupation and acquiescence for a few months, is not sufficient to change the true line, and that "scarcely less than twenty years" would effect such change.

The substance of these authorities on the point of acquiescence seems to be this:

Where the description of the premises in a deed is definite, certain and unambiguous, no extrinsic evidence is admissible to show a different location, unless a possession be shown under claim of title for such a length of time as to bar a recovery in ejectment. If, however, the description is vague, obscure or ambiguous, or the monuments referred to have become decayed or destroyed, such evidence is admissible in aid of the deed.

Agreement.—Let us next inquire what kind of an agreement is necessary to effect a practical location.

As we have seen, a majority of the court in *Jackson v. Dyeing* thought that a *parol* agreement to abide by a certain division line will be sufficient to prevent either party from claiming an ejectment, though it will not pass the lands. But this was an agreement that had been recognized for forty years.

Sellick v. Addams, 15 Johns. 197, was an action of trespass for cutting timber. There had been a general submission by bond seven years before, of all controversies and demands, and under this the arbitrators had fixed a boundary line. This, the court said, would have enabled the defendant to maintain ejectment, and justify the trespass.

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Shepard v. Ryers, 15 Johns. 497, was assumptit to recover damages for breach of an agreement under seal, by which the plaintiff and defendant appointed certain persons to partition certain lands between the parties. The defendant had refused to abide by the award. It was held, that the plaintiff was not entitled to recover any part of the consideration in a deed of the premises which he had executed, his grantee never having been evicted, and his liability being merely contingent; and they further remark, "the partition made by the persons appointed for that purpose might be considered in the nature of an award of arbitrators, which, though it might not have the operation of conveying the land, might estop the defendant."

In *Jackson v. Gager*, 5 Cow. 383, an action of ejectment, the question was of location. This depended on a submission of the boundaries to arbitration by E. H., deceased, as attorney. It was undertaken to prove the execution of the power of attorney, and the court also admitted proof of a parol submission under it, and of a parol award. On review, the court held the power not properly proved, and granted a new trial for that reason. Then the court remarked, "without, however, intending to express a definitive opinion upon the subject, that the submission and award, though relating to real estate and by parol, were valid, and not within the provisions of the statute of frauds," and continued so to remark for a page and a half, citing *Jackson v. Dyring*.

In *Robertson v. McNeil*, 12 Wend. 573, tried in 1831, there was a submission in writing, not under seal, in 1830, to arbitrators concerning a division line, and a written award. This was held conclusive on the ground of estoppel. The cases relied on were those above cited. This seems to be the first decision necessarily involving the question.

Davis v. Townsend, 10 Barb. 333, tried in 1850, was an action of trespass, involving a division line and fence between two farms, which had stood for thirty years. The plaintiff showed title to the *locus in quo*, but the defendant showed an oral agreement on the part of the plaintiff, that the fence might be straightened, in pursuance of which defendant, about six years before, moved the fence eighteen inches over upon the plaintiff's inclosure. For that act this action was brought. It was proved that the plaintiff objected pending the removal, and no consideration was paid. Verdict for defendant. On review, the court say: "It has been repeatedly held that a parol agreement to ascertain and establish a boundary line between the owners of adjoining lands, which is *in dispute* and *in some degree unknown and undefined*, either directly by the parties themselves, or through the submission to an award of others, is not an agreement which extends to the title, and, therefore, not within the provisions of the statute of frauds." "But, where the line is already well known and established; where it has been recognized and acquiesced in by the adjoining owners; and more especially where it is indicated and marked out by fences or other permanent monuments to which they have claimed and occupied for a sufficient length of time to bar an entry, a parol agreement to change it differs entirely in its effect from that to which I have before referred, and does extend to the title." A new trial was granted.

Voorburgh v. Teator, 33 N. Y. 561, was an action of trespass involving a disputed division line. The plaintiff produced evidence that he and his predecessors had possessed the *locus in quo* more than twenty years, but the paper title was not given. The defendant gave evidence tending to show that the true line was elsewhere, and that the plaintiff's occupation was by special permission. It was also shown that the line was in dispute in 1846, and that then, as defendant claimed, an agreement was orally made that a surveyor should run and fix the line, and that the parties should abide by it, and put the fence on it. The plaintiff claimed that it was only one end of the line that was in dispute. The surveyor did run and fix the line, but it was a disputed question of fact whether he ran the whole line or not. The new line took some land in one place from the defendant, which the plaintiff availed himself of. In another place the line so run would deprive the plaintiff of land, and this he objected to, and when the defendant commenced, three years after, to move his fence to the new line, plaintiff brought this action. There was a verdict for plaintiff. The court held that it is the policy of the law to permit parties to settle and adjust doubtful, uncertain and disputed facts between themselves, and, when so settled upon a good consideration, not to permit them afterward to be brought into dispute. That a disputed

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indefinite or uncertain boundary line between adjoining proprietors may be fixed by parol or arbitrament. But an agreement by parol to establish a new line, where the boundary is not indefinite or uncertain, is void. That the force of such agreement is by way of estoppel. Verdict sustained.

It had been previously held in *Terry v. Chandler*, 18 N. Y. 354, that such an agreement, where there was no uncertainty in the grants, and no adverse possession, was void, and this was approved in *Fosburgh v. Teator*. In the former case, A and his grantors having possessed land on both sides of a ditch for more than twenty years, under claim of title by deed, A by parol agreed with B, who claimed some of the land so possessed on one side, that the ditch should constitute the division line, and B entered and kept possession accordingly for five years. Held, not to affect the title, and that A could recover possession.

The substance of these authorities seems to be this :

A parol agreement between adjacent owners of land to fix a disputed division is valid and binding by way of estoppel in those cases where the grant is so indefinite, uncertain, or ambiguous that the true line is not ascertainable therefrom, but in no other.

STATE EX REL. BILLINGSLEY V. SPENCER.

(64 Mo. 355.)

Exemption from execution of partnership assets.

On execution against members of a partnership, the defendants are not entitled, either jointly or severally, to an exemption of the partnership assets, under a statutory exemption, to a certain amount of "any other property," beside specified articles, allowed to heads of families. (*See note, p. 246.*)

ACTION on a sheriff's bond to recover for a breach of duty in delivering up attached property. The opinion states the case.

E. J. Montague, for appellants.

W. H. Phelps, for respondents, cited *Stewart v. Brown* 37 N. Y. 350; *Knapp v. Bartlett*, 23 Wis. 68; *Gilman v. Williams*, 7 id. 329; *Kiskaddon v. Jones*, 63 Mo. 190.

HENRY, J. In September, 1874, R. L. Billingsley & Co. commenced a suit by attachment against Kent and Black, and said attachment was, by defendant Spencer, then sheriff of Jasper county, levied upon personal property belonging to Kent and Black as partners. Kent and Black were each the head of a family, and neither of them owned any property mentioned in the first and second subdivisions of the ninth section, of chapter 55,

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Wagn. Stat. 603. Kent had household goods of the value of three hundred dollars, and Black had household goods of the value of one hundred and twenty-five dollars, and a set of carpenter's tools worth about thirty-five dollars. The partnership goods levied upon by the sheriff were of the value of one hundred and fifty dollars. Defendants, Kent and Black, claimed the property under the eleventh section of chapter 55, which provides that "each head of a family, at his election, in lieu of the property mentioned in the first and second subdivisions of section nine, may select and hold exempt from execution any other property, real, personal or mixed, or debts and wages, not exceeding in value three hundred dollars."

The sheriff allowed their claims, and returned to them the property he had attached. Billingsley & Co. prosecuted their said suit, and at the May term, 1873, of the Common Pleas Court of Jasper county, recovered a judgment against Kent and Black for \$105.50. Afterward a special execution was issued on said judgment and placed in the hands of the sheriff of Jasper county, one Zane, who duly returned thereon that he could not find the attached property, and the present suit was instituted against Spencer, and the other defendants; his sureties on his official bond, to recover for the alleged breach of duty on the part of Spencer, in delivering to Kent and Black the attached property.

There was a trial in the Common Pleas Court of Jasper county which resulted in a verdict and judgment for defendant, from which an appeal has been duly taken by plaintiff to this court and the only question presented for determination is whether one or more of the members of a partnership are severally or all of them jointly entitled to partnership assets, to the amount specified in section 11 as exempt from execution under sections 9 and 11?

They cannot claim the exemption as a partnership, for a partnership cannot be the head of a family. If they can severally claim, how is the officer to determine what specific portion of the assets belongs to the claimant, without first making a settlement of the partnership accounts, as between the partners, and also as between the firm and its debtors and creditors?

Neither partner exclusively owns any of the assets, nor until a final settlement of the partnership business could the officers determine the interest of either member in the assets of the firm. The amounts of money invested by them respectively would be no crite-

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tion, for the partner who furnished in the first instance the largest amount of capital, on final settlement might be found to have no interest whatever in the assets then on hand. Supposing a debt due to the firm be garnished, could one partner claim the exemption out of that indebtedness, and the officer allow him individually a given amount, and the plaintiff in the execution recover the balance against the debtor, thus dividing into two, or more, his single obligation to the firm?

The difficulties are not obviated, where, as in the case at bar, all the partners severally claim the exemption, for still there would have to be a settlement of the partnership business in order to determine what to allow each member. The state of the accounts, as before remarked, might be such that one, or more of the firm, would have no interest whatever, and the others would have an excess over the amount exempt; and if the officer allowed each his exemption the creditor would be prevented from having applied to his debt that excess thus given to a partner, or partners, who have no interest in the assets. If instead of severally claiming, they make a joint claim to the exemption of the amount specified in the eleventh section, it might be that each of the members, but one, owned all the property in kind and amount specified in the eleventh section, and had no right to the exemption.

The fact, that the difficulties suggested could not have occurred in the case at bar, is no answer to the argument, for that they would occur in a vast majority of cases, is conclusive against the construction of the statute contended for by respondent. The law declares the exemption in favor of a head of a family, and this precludes the officer from allowing it to the partners jointly.

We are satisfied that the eleventh section does not embrace either a partnership, or the members of the firm severally or jointly, as to partnership property, and this view is sustained by *Pond v. Kimball*, 101 Mass. 105; *In re Handlin*, 3 Dill. 290; *Bonsall v. Comly*, 44 Penn. St. 447; *Guptil v. McFee*, 9 Kans. 30. The courts of New York, Wisconsin and North Carolina, hold otherwise, but the weight of authority and argument, we think, sustains the conclusion we have reached.

Judgment reversed and cause remanded. The other judges concurring except SHERWOOD, J., absent. *Judgment reversed.*

NOTE BY THE REPORTER.— A review of the authorities will show that while there is conflict upon this question, yet so far as there is any deliberate and well-considered expres-

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sion, the courts of New York stand alone in opposition to the doctrine of the principal case. Whether the majority have the better reason may well be doubted. We premise by pointing out that the statutory exemptions are substantially alike in all the States; the language used designates the singular number. The following are the principal decisions, *pro* and *con*. In agreement with the principal case:

Bonsall v. Cornely, 44 Penn. St. 442, A. D. 1863, was the case of distress against joint owners of chattels. The court say: "Joint debtors are certainly not within the letter of the statute. The words are, 'property to the value of \$300, exclusive of all wearing apparel of the defendant and his family, and all Bibles and school books in use in the family (which shall remain exempt as heretofore), and no more, owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent.'" "It seems to me quite apparent that the execution or warrant against which the exemption may be claimed, must be such as is levied on several property. To hold otherwise, where the execution is joint, and the levy is on joint property, would be to allow each one of the joint debtors to claim the exemption." "It is the 'debtor,' the 'defendant,' and 'his family,' who are described as the beneficiaries of the statute, and the words used are to be first resorted to in ascertaining the legislative meaning. They are ordinarily to be taken in their usual import, unless a more extensive or general signification be evidently required by some other rule of construction. '*Ubi lex est specialis, et ratio ejus generalis, generaliter accipienda est.*' For instance, if it should be provided in a general statute that stay of execution, or some other privilege, should be allowed to 'debtors,' who should apply for it under certain instructions, it could not be doubted but that it would extend to all debtors, whether joint or several. But all debtors in this statute are obviously not entitled to exemption. Nobody supposes that corporations, associations, and partnerships are, yet they may be, debtors against whom execution may issue jointly. The statute does not, therefore, extend universally to all debtors." "Many difficulties might be pointed out in the way of applying the machinery of the statute, intended to apply to the several property of a several creditor, to cases of joint property or joint creditors."

Pond v. Kimball, 101 Mass. 105, A. D. 1869. The court say: "We agree with the plaintiff's counsel that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it, consistently with its true and just interpretation. There are many difficulties, however, in the way of applying it to the case of copartners and joint owners, and these difficulties we find to be insuperable. Property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partnership property. On the decease of one member of the firm, it would necessarily go to the surviving member, and he would have a right to hold it, to be used in settling the affairs of the concern, and paying its debts. In the case of numerous partners, can it be said that each of them would have the right to claim, as exempt from attachment from the joint debts, one hundred dollars' worth of tools and implements, and another hundred dollars' worth of materials and stock; or is the whole firm to be considered as one debtor only? Does the exempt property in that case belong to the partners jointly, or does each take a separate share? It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless, possibly, the clause as to fishermen be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessities, out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his account with the firm. The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only. If he desires to form a partnership and combine his means with those of one or more than one other person, he must take the precaution to retain exclusive ownership of his tools and implements, allowing the use of them to his associates, or he will lose entirely the benefit of the statutory exemption as to that kind of property."

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Guptil v. McFe, 9 Kans. 30, A. D. 1872. The court say: "The reasons given in the case of *Pond v. Kimball*, *supra*, why partnership goods are not exempt from execution are very strong, and we could not, if we would, add any thing to them." "How is it to be determined whether the partnership or corporation will desire to reserve any thing as exempt? May a majority of the members determine the matter? Or may those who own an interest greater than one-half determine the matter? And will the minority, or those who represent the less interest, be governed by the majority, or those who represent the greater interest, or *vice versa*? If one portion of the members is not to be governed by the other portion, or if four hundred dollars' worth of the property is to be exempt in favor of some of the members, and not in favor of others, how is the exempted property to be separated from the balance? Can the officer effect the separation? Can any number of the members less than a majority, or can even a majority, do it? Some of the members may have a great interest in the copartnership or corporation. Others may have only a small interest. Some members of a copartnership have only a slight interest in the profits of the business. But if we adopt the theory, which is the true one, that the exemption is in favor of individuals only, we are equally led to the conclusion that partnership property is not exempt from execution." "Suppose the firm should consist of twenty members, could they hold in the aggregate \$8,000 worth of property, as 'stock in trade,' exempt from execution, and continue to do business on it without paying their partnership debts, or would they be confined to \$400 worth? And suppose that nineteen of the members had no property in the world not exempt from execution, and that the twentieth one had an abundance outside of the copartnership property; could those nineteen, by claiming their exemptions, compel the twentieth one to pay all the copartnership debts? And suppose this twentieth one owned nearly all the capital that had been put into the copartnership; could the nineteen hold their exemptions not only as against the creditors of the firm and others, but also against this twentieth member? We think not. One partner has just as much right to control the disposition of partnership property as another. One partner has just as much right to say that a certain specific article of partnership property shall not be exempt, as another has to say that it shall be exempt. In fact he has a better right, for the partnership was certainly not created for the purpose of holding property exempt from execution. If a party desires to retain his personal property as exempt from execution, he must either not put it into a copartnership, or he must get it out of the copartnership and make it his own exclusively before an execution against the firm is levied on it."

In *re Handlin*, 8 Dill. C. C. Rep. 290, A. D. 1875. This case arose on the claim of exemption under the Bankrupt Act. Judge DILLON says: "Taken all together, this language does not contain any thing to favor, but much to contravene, the notion that individual exemptions should be allowed out of the partnership estate." "But conceding that the language of the Bankrupt Act and of the Constitution of the State is not so clear to this end as to exclude doubt, the general principles of the law are against allowance of the exemption claimed." "While the adjudged cases relating to the question under examination are not uniform, a careful examination of all of them justifies me in saying that they are quite decisively against the proposition that individual exemptions can be allowed out of the partnership estate, at the expense of the joint creditors."

Gaylord v. Imhoff, 26 Ohio St. 317; 20 Am. Rep. 762, A. D. 1875. "The members of an insolvent firm are not entitled to the statutory exemptions out of the partnership property, after it has been seized in execution by partnership creditors, notwithstanding all the members join in demanding the exemptions." The court disagree with *Stewart v. Brown* and *Burns v. Harris*. They say: "Looking alone to the language of the section above quoted, we find nothing to justify the inference that the legislature in passing it was intending to provide for other than individual debtors, and for the exemption of their individual property from sale on execution; and when construed with the law relating to partnerships, as it has always stood and still stands, we are convinced that it could not have been the intention of the law-maker to bring partners or partnership property within the operation or provisions of the section in any respect." "The right to the exemption, therefore, manifestly depends upon the power of selection, and this power must relate either to property of which the execution debtor is the absolute owner, or to property of which he has the possession or actual control as against the officer holding the execution." This was a unanimous decision.

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On the other hand: *Gilman v. Williams*, 7 Wis. 386, A. D. 1858. The court say: "The instruction asked for seems to be based upon the hypothesis that a team of horses which belongs to two men in partnership is not exempt from execution against the firm. Is this sound doctrine?" "If one of these partners had owned both the horses, would they have not been clearly exempt? Can the fact, therefore, that each one of the partners, or joint debtors in the execution, owned a moiety in each of the horses render such moiety liable to execution? If the whole would be exempt in either, would the moieties be liable in both? Does not the greater include the less in this as in other cases?" "The exemption laws are remedial and beneficial acts of legislation, and we are disposed to give them a liberal interpretation and to administer them in the benign spirit in which they were enacted."

Later, in Wisconsin, however, there seems to have been a disposition to limit the doctrine to property divisible in its nature, as in the case of grain, etc., in *Newton v. Howe*, 39 Wis. 581.

It was said, *obiter*, in *Wright v. Pratt*, 31 Wis. 104, "Immunity from sale upon execution seems to imply or be founded upon the idea that the exempt property is necessary for the support of the debtor and his family; and that it may be held, possessed, and used by him in carrying on his business, trade or profession. This seems to be the principle underlying the exemption laws. But it is obviously impracticable to apply that principle to an undivided interest in a horse and buggy, which the debtor cannot claim to hold to the exclusion of his co-tenants." "The property is incapable of division, and each of his co-tenants has the same right to the possession of the horse, buggy and harness that he has. There can be no exclusive possession rightfully belonging to one tenant in common in such property, except with the consent of the other co-tenants. How can the principle of exemption then be worked out and applied to the share of the plaintiff?" The court distinguish *Gilman v. Williams*, on the ground that "both the owners claimed the exemption," while in the present case, "possibly the evidence will show"—a new trial being granted—"that only one of the owners is claiming that his third is exempt."

At length in *Russell v. Lennon*, 39 Wis. 578; 20 Am. Rep. 60, A. D. 1876, the court, on the persuasive authority of *Pond v. Kimball*, flatly overrule *Gilman v. Williams*, Judge Cole dissenting on the principle of *stare decisis*. The court say: "It was no doubt a great temptation in that case, as it has been in this, to support an exemption which might have been, but was not properly asserted; to make the judgment 'to do a great right, do a little wrong.' But the view of the learned judge who delivered the judgment in that case is clearly erroneous. He reasons that either of the two partners might have held the whole property exempt; that each might hold a moiety of it exempt; and that so the joint suit by both partners for the whole could be sustained. He appears to have overlooked the elementary principle that several rights of several persons cannot be asserted in a joint action at all: that partners can maintain an action as such for partnership rights only. The truth appears to be that this question was very much disregarded in view of others in that case, then deemed of much greater moment." And yet the court in that case called this one of "the more difficult questions involved."

Stewart v. Brown, 37 N. Y. 350, A. D. 1867. The court say: "It is insisted that the clause applies only to a several owner, as the word 'person' is used in the singular number. The short answer is, that by a provision in our general law, when a statute refers to any matter or person, by words importing the singular number, several matters or persons shall be deemed to be included, unless such a construction would be repugnant to the general language employed. (2 R. S. 778, § 11.) In respect to articles, otherwise within the terms of the act, such ownership as suffices to make them subject to seizure, brings them within the exemption. If each of the respondents had owned a pair of horses, both teams would have been exempt, upon the state of facts found by the referee. It would be an obvious perversion of the statute, to hold that the plaintiffs forfeited its protection, by owning but a single team between them, used for the common support of both. The language of the act should be construed in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it assumes to protect is that belonging to the debtor, be it more or less. The ownership of the team may be joint or several; it may be limited or absolute. Whatever it be, within the limitations of the statute, the debtor's interest is exempt, in view of his own necessity, and of the probable des-

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titution to which its loss might reduce a family dependent on him for support." The opinion was unanimous.

Burns v. Harris, 67 N. C. 140, A. D. 1873. The court say, without further consideration: "One of two or more partners cannot have a portion of the partnership effects set apart to him as his personal property exemption, without the consent of the other partner or partners; because the property is not his. But if the other partner or partners consent, then it may be done. The creditors of the firm cannot object, because they no more have a lien upon the partnership effects for their debts, than creditors of an individual have upon his effects. In our case the partners did assent."

This matter is well summed up by Mr. Thompson (*Homesteads and Exemptions*, § 216), as follows: "We have then in favor of the rule of allowing either to a partnership firm or to the individuals composing it, the exemption fixed by statute, out of the partnership assets, in case there are not sufficient personal assets, a principle of construction which seems obvious and irrefutable, namely, that if the debtor has any interest in property, be it real or personal, which, under the general law, the creditor can subject to the satisfaction of his debt, the statute of exemptions will step in and secure a defined portion of it to the debtor. Against this plain principle we have a rule of convenience merely, supported by a preponderance of authority, but confessedly based mainly upon the idea that the exemption here under consideration is several, personal and individual, as well in regard to the property to which it applies as to the right conferred; and also upon the impracticability of giving it the application sought, growing out of the nature of partnership property and the relations of partners to each other and to creditors"—an impracticability which, in the belief of the writer, is much more fanciful than real."

COUNTY OF VERNON V. STEWART.

(64 Mo. 406.)

Statute of limitations — payment by administrator of one joint obligor.

Part payment upon a bond, by the administrator of one of the obligors before the statute of limitations has run against it, will prevent the running of the statute as to the other obligors.*

ACTION on a bond. The opinion states the facts.

James B. Gantt, for appellant.

B. G. Boone, for respondent, cited *Smith's Adm'r v. Irwin*, 37 Mo. 169; *Cape Girardeau Co. v. Harbison's Adm'r*, 58 id. 90; *Van Keuren v. Parmlee*, 2 Comst. 523; *Shoemaker v. Benedict*, 1 Kern. 176; *Bell v. Morrison*, 1 Pet. 373; *Knight v. Clements*, 6 Am. Rep. (45 Ala. 89), 693; *Root v. Bradley*, 1 Kans. 437; *Hathaway v. Has-*

* Compare *Bush v. Stowell* (71 Penn. St. 206), 10 Am. Rep. 624; *Seig v. Acord's Exr.* (21 Gratt. 365), 8 Am. Rep. 605; *Beardsley v. Hall* (36 Conn. 270), 4 Am. Rep. 74; *Merrill v. Day* (38 N. J. 82), 30 Am. Rep. 363; *Knight v. Clements* (45 Ala. 89), 6 Am. Rep. 693; *Schindler v. Gates* (46 Md. 604), 24 Am. Rep. 596.

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Id., 9 Pick. 42; *Callaway County v. Nolley*, 31 Mo. 393; *St. Charles County v. Powell*, 22 id. 525; *Abernathy v. Dennis*, 49 id. 468.

SHERWOOD, C. J. Action on a school bond against defendant as one of the sureties thereon. Plea of the statute of limitations.

The cause was tried December term, 1874, of Henry Circuit Court, by the court without a jury, upon the following agreed statement of facts :

1st. The school bond, the foundation of this suit, was offered in evidence without objection, and was in words and figures as follows : "Twelve months after date, for value received, James Clinton as principal, and John W. Stewart and James W. Morris as securities jointly and severally promise to pay to the county of Vernon, for the use of the common school fund in said county, the sum of seventy-eight and sixty-one hundredths dollars, to be paid into the treasury of the county of Vernon when this bond shall become due, with interest at the rate of ten per cent per annum from date until paid, and which interest is payable on the 31st day of December in each year, and in case of default in payment of the interest, or failure of the principal in this bond to give additional security when thereto lawfully required, both the principal and interest shall become due and payable forthwith, and all interest not punctually paid shall become principal and bear interest at the same rate as principal. Witness our hands and seals this first day of January, 1860.

"JAMES CLINTON, [SEAL]
"JOHN W. STEWART, [SEAL]
"JAMES W. MORRIS. [SEAL]"

It had also the following indorsement on it: "Filed and approved by the court, February 9th, 1860; D. C. Hunter, clerk, by Allen Blake, deputy clerk." Also the following: "\$44.33 principal paid December 2, 1869, L. C. Hall, per Wey, and also allowed on the within bond the sum of \$98.13, in the third class of demands June 7th, 1867, Albert Badger, probate judge."

It was then mutually agreed by plaintiff and defendant that the payment set up in the petition was made as stated in the petition, and that J. P. Maxey was duly and legally appointed and qualified as administrator of James Clinton, one of the obligors named in the bond sued on, and that said Maxey, as adminis-

trator of Clinton, on the 2d day of December, 1869, and before the bar of the statute of limitations had attached or run against plaintiff, made a payment of \$43.33 on said bond. And it was further agreed that each and every fact stated by plaintiff in his petition was true.

On part of the defendant no evidence at all was introduced, defendant taking the position that plaintiff could not recover on the facts as stated.

The court took the same view of the matter, gave a declaration of law to that effect, and judgment for defendant.

Repeated decisions of this court have settled the matter beyond controversy, that the payment of a portion of a debt evidenced by a promissory note, or similar obligation, by one of the payors before the expiration of the statutory period, would prevent the operation of the statute against the co-maker as well as the party paying. *Craig v. Callaway County*, 12 Mo. 94; *Lawrence County v. Dunkle*, 35 id. 395; *Block v. Dorman*, 51 id. 31. And no reason is seen why the same principle is not applicable, where, as in the present instance, the legal representative of one of the makers makes a similar payment. The statute, after treating of new promises and acknowledgments in writing and the effect to be given them, explicitly provides: "Nothing contained in the two preceding sections shall alter, take away, or lessen the effect of payment of principal or interest by *any person*," thus clearly showing that the legislature intended to make, and did make, a marked distinction between the attendant results of promises or acknowledgments on the one hand, and partial payments on the other. And if that language just quoted will not comprehend the payment by an administrator, it is difficult to see what language, short of a direct designation of the administrator, would be sufficiently comprehensive to accomplish that result. Had Clinton, the principal in the bond, remained alive and made the payment referred to, no doubt could arise, under the foregoing decisions, but that such payments would effectually prevent the operation of the statute as to the defendant. Can it alter the nature of the case, because the duty of paying the debt is devolved upon the administrator, rather than, and instead of, the decedent?

We are clear that it cannot. If the defendant, instead of the administrator, had made the payment, could it be seriously doubted that he would have recourse against the estate of his principal?

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Upon what theory would such recovery be founded, except that of the continued existence of the mutuality and privity incident to the contract at the time of its formation? In *McClurg v. Howard*, 45 Mo. 365, it was held that although the partnership was dissolved, yet a partial payment before the statute had run by Howard's former copartners would take the case out of the statute as to him. And it would seem obvious that the dissolution of a copartnership could accomplish no less toward sundering existing relations than the death of one or two or more joint obligors. The cases of *Smith's Admr. v. Irwin*, 37 Mo. 169, and that of *Cape Girardeau County v. Harbison, Admr.*, 58 id. 90, have not the slightest applicability here; because in neither case had any payment been made by the administrator. In the former an allowance was had against the estate of one of the makers, *after* the statute had attached, and in the latter case, the administrator had, in making a deed of trust, acknowledged, after the claim was barred, the existence of the debt. Any remarks, therefore, in those cases, which are *dehors* the controlling facts incident to each, cannot be deemed as possessed of any authoritative value.

Holding these views, we shall reverse the judgment, and as it is apparent, from the facts agreed on, that it would serve no useful purpose to remand the cause, we shall direct such a judgment as plaintiff should have recovered below to be entered here.

All the other judges concur.

Judgment reversed.

STATE EX REL. NORTON V. LUPTON.

(64 Mo. 415.)

Constitutional law — quo warranto — jury trial.

In cases of *quo warranto* the defendant has no constitutional right to a jury trial.*

QUO WARRANTO. The opinion states the facts.

Crow & Hess, for appellant.

W. H. Phelps, with *Walsor & Cunningham*, for respondent.

* See *contra*, *People v. Albany & Susquehanna R. R. Co.*, 87 N. Y. 161.

HOUGH, J. This was an information in the nature of a *quo warranto*, brought at the relation of W. S. Norton against the defendant, Lupton, for an alleged intrusion into and usurpation of the office of city marshal of the town of Joplin.

It appears from the record that the defendant was, in October, 1873, elected city marshal of said town of Joplin, and soon thereafter duly qualified and entered upon the discharge of his duties. In the following April an order was made by the city council, removing him from office for some alleged official misconduct, and the relator was appointed to fill his place. In pursuance of a provision in the city charter authorizing the city council to provide by ordinance for the removal from office of all city officers, for neglect of duty or misconduct in office, an ordinance was passed declaring that any officer who should fail or refuse to obey any ordinance, resolution or order of the board of councilmen, should be deemed guilty of a neglect of duty, and that any officer who should willfully violate any ordinance, resolution or order of the city council, or any provision of the original or amended charter, or who should be guilty of habitual drunkenness, should be deemed guilty of misconduct in office. The following record was read in evidence to establish the motion of the defendant: "Charges were preferred and filed by Judge Jacob Hogle, affiant, against J. W. Lupton, defendant, for misconduct in office and neglect of duty. Signed: Lee Taylor, Mayor, J. W. Ried, Clerk. April 15th, 1874. The case of the *City of Joplin v. J. W. Lupton* was taken up and some additional evidence taken in behalf of the defendant; the board then retired for a few minutes, and returned the following verdict, viz.: The board of councilmen find J. W. Lupton guilty of neglect of duty and misconduct in office, and, on motion, it was resolved that he be discharged from the office of city marshal and said office is hereby declared vacant."

The defendant demanded a jury, which was refused, and the cause was tried by the court and a judgment of ouster was rendered against the defendant, from which he has appealed to this court.

Some doubt has been expressed by the courts of last resort, in several of the States, as to whether the constitutional right of trial by jury extends to cases of information in the nature of *quo warranto*. *State ex rel. v. Allen*, 5 Kans. 213; *State v. Johnson*, 26 Ark. 281. In the latter case, the act of 3 Geo. II, ch. 25, provid-

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ing for juries in informations in the nature of *quo warranto*, was cited as supporting the view that at common law questions of fact in such cases were tried by the court, otherwise there would have been no necessity for the act. The old writ of *quo warranto* was a civil writ at the suit of the crown, and the information in the nature of a *quo warranto*, though originally a criminal prosecution, has long been regarded as a purely civil proceeding, notwithstanding the court still possesses the power to fine any person adjudged therein to be guilty of usurping, intruding into or unlawfully holding and executing any office or franchise; and if the provisions of our practice act, relating to trials by jury in civil cases, can be held to be applicable to informations in *quo warranto*, a jury to try disputed questions of fact in such cases cannot be demanded as a matter of right. In the case of *The State v. Vail*, 53 Mo. 97, which was an information in the nature of a *quo warranto*, brought by the attorney-general *ex officio*, it was said that the defendant was not entitled to demand a jury. In the case of *The State v. Townsley*, which was a like proceeding, a jury was accorded *ex gratia*. We see no error in the refusal of the court to call a jury.

[Omitting a minor point.]

The record is insufficient to show a lawful motion, and the judgment will be reversed and the cause remanded; the other judges concur.

Reversed and remanded.

LILLIS V. ST. LOUIS, KANSAS CITY & NORTHERN R. CO.

(84 Mo. 484.)

Commutation railway ticket for limited time—rights of holder.

A commutation railway ticket, conditioned to be "good for 1,000 miles" and "within six months," is not good after six months, although the holder has not travelled 1,000 miles on it; and where, after the expiration of that period, he enters the baggage car of the company, and refuses to pay his fare except by presenting such ticket, he is a trespasser, and may be ejected at any point, and is not entitled to the benefit of a statute which prohibits the ejection of passengers except near a dwelling-house or at a station.

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ACTION of damages for ejection from a railway train. The opinion states the facts. The plaintiff had judgment, and the defendant appealed.

Wells H. Blodgett, for appellant.

Tichenor & Warner, for respondent.

HENRY, J. On the 18th day of June, 1873, the plaintiff purchased of the defendant a thousand-mile ticket, to be used within six months from that date on defendant's railroad. The following is a correct representation of the face of the ticket:

1	1	1	1	1	1	1	1	0	2	2	2	2	2	2	2	2	3	3	3	0	0
0	1	1	1	1	1	1	2	2	2	2	2	2	2	2	2	2	3	3	3	3	3
0	0	0	This Ticket is good for 1000 miles traveled on the St. Louis, Kansas City & Northern Railway and branches, only when properly stamped and presented, within six months from date, by LAWRENCE LILLIS, under the conditions printed on back. * * lbs. baggage paid. F. CHANDLER, Gen'l Pas'gr. & F't. Agt. No. 1224.																3	3	3
0	0	0																	3	3	3
0	0	0																	4	4	0
0	0	0																	4	4	4
0	0	20																	4	4	4
0	0	20																	4	4	4
0	15	0																	4	4	0
0	0	15																	4	4	0
0	10	0																	5	4	0
0	0	10	0	10	6	6	6	6	6	6	6	6	6	6	5	5	5	5	5	5	5
0	0	0	0	0	0	0	6	6	0	0	0	6	6	5	5	5	5	5	5	5	0

On the back of said ticket were the following conditions:

1. "This ticket is good only for passage of the person named thereon, and if presented by any other person, the conductor will take it up and collect full fare.
2. "For each trip, the conductor will punch out figures indicating the number of miles travelled with him on that trip. The holder must in all cases take a train which stops regularly at the station to which he is going.
3. "No portion of the money received for this ticket will be refunded on account of failure to use it within the specified time, nor will its limits be extended. It will not be good for passage unless presented within the limits named below.
4. "This ticket is good for freight trains, only on the express conditions that the passenger named on it, while on such trains, assumes all risk of accident and expressly agrees that the company

shall not be liable, under any circumstances, whether of negligence by their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using the ticket, and agrees that he, or she, will not consider the company as common carriers, or liable to him, or her, as such.

5. "This ticket is good only until December 18th, 1873."

On the 9th day of February, 1874, the plaintiff, at Kansas City, entered the baggage car attached to one of defendant's passenger trains, bound for St. Louis, and when the conductor of the train, S. H. Miller, applied to him for his fare, or ticket to his place of destination, he tendered this 1000 mile ticket. The conductor told him he could not pass him on that ticket. Plaintiff said he would not pay his fare. Conductor then told him he would put him off. Plaintiff said "that is all right." The conductor pulled the bell-cord and asked plaintiff to get off, and he again said he would not. The conductor then took hold of him to put him off, and plaintiff resisted. This is the plaintiff's own statement. The conductor not being able to eject plaintiff from the car, called to his assistance the baggage-master, who also took hold of plaintiff, and told him he had better get off and have no trouble, and remarking to plaintiff that he and the conductor could not put plaintiff off, they left him and went back into the passenger car, but in a short time returned with several other employees of the company, who finally succeeded in putting plaintiff and his baggage off, at a place about one mile from Harlem station, and four miles from the next station east, and almost six hundred yards from a house north of the road, but whether a dwelling-house or not, the evidence leaves in doubt. This occurred a little before sunset, and plaintiff walked back to Kansas City, arriving there before dark. Plaintiff received a cut on the head and on the little finger, and he testified that at one time during the melee he had hold of the conductor's coat, and the latter struck him a blow on the forehead, and that some one called out to the conductor, "don't strike him in the face." Plaintiff offered all the resistance in his power, and is a man of considerable physical strength. We infer from the evidence that he was, physically, a powerful man.

Plaintiff is contradicted by the conductor in regard to the latter striking him, nor is he corroborated in his testimony, on that point, by any other witness. It seems, from his testimony, that he had consulted a lawyer, who gave it as his opinion, that although six

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months from the date of the one thousand mile ticket had expired, he had a right to ride on the defendant's road until he had travelled the one thousand miles. He had travelled four hundred and fifty miles on that ticket, and if valid there were enough miles remaining to carry him to St. Louis. The injuries received by plaintiff did not disable him, or interfere with his business, except to detain him at Kansas City until the next train went east, not exceeding twenty-four hours. Plaintiff sued the defendant to recover damages, and on a trial in the Circuit Court of Jackson county had a verdict for \$3,000, but at the suggestion of the court entered a *remittitur* of \$1,000, and judgment was then rendered in his favor for \$2,000, from which defendant has appealed to this court.

[Omitting instructions.]

Instruction refused: 6. "If the jury find, from the evidence, that the plaintiff knew the terms and conditions of the ticket read in evidence, and that with such knowledge he did, on the 9th day of February, 1874, enter and remain in a baggage car attached to a passenger train on the defendant's road, with a design of being conveyed upon said ticket from Kansas City to St. Louis, without paying or intending to pay to the defendant any fare, and that he refused to pay his fare after the same was demanded of him by the conductor, then the jury is instructed that the plaintiff did not become a passenger upon said train, and the conductor thereof had a right to stop said train at any place, and use sufficient force to expel or eject the plaintiff and his baggage from said car without rendering the defendant liable in this action."

The court refused to give the said instruction No. 6, and defendant excepted.

The instruction asked by defendant and refused by the court presents the question, whether on the facts in this case plaintiff was a passenger on defendant's train, and as such entitled to the rights and immunities secured to passengers by the law.

It is evident that plaintiff entered the train determined not to pay any fare, but to travel upon his one thousand mile ticket, or be ejected from the train. He at no time offered to pay any fare, declared repeatedly that he would not, and had previously taken the opinion of a lawyer, who had advised him that he had a right to ride on defendant's road until he had travelled the entire number of miles specified, without regard to time.

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He knew the conditions printed on the back of the ticket; and on its face was an express printed stipulation that the ticket was good, "when properly stamped and presented within six months from date by Lawrence Lillis, under the conditions printed on the back."

He testifies that he knew what the conditions were. When the conductor refused to carry him on that ticket, he did not leave the train when ordered to do so — which he might have done and instituted a suit if he desired to test the correctness of his lawyer's opinion, that he had a right to ride on that pass — but by physical resistance compelled the conductor to call to his assistance three or four other employees to eject him from the car. That he went into that car with the deliberate purpose of laying the foundation for a lawsuit, with no intention of becoming a passenger unless he could by muscular power compel the conductor to carry him, is from the evidence in the case beyond all controversy, and he was as much a trespasser as if he had gone into that express car to rob it of its contents. Under these circumstances, is he to be regarded as a passenger? We think not, and to hold otherwise would be to disregard well-established principles, which in cases between individuals no court would hesitate to recognize.

Merchants, shop-keepers and hotel-keepers, by the very nature of their respective occupation, give a general invitation to all persons to enter their house of business, but if one entered one of these business houses for the purpose of pilfering or committing some other depredation, and is ejected, he cannot have an action for the trespass, and the general license given to enter would avail him nothing in a suit against the proprietor. He might recover if more force were used than was necessary to put him out, but the general implied invitation would not be allowed to be considered by a jury in determining the amount of his damages.

In the *Union Pac. R. R. Co. v. Nichols*, 8 Kans. 505; s. c., 12 Am. Rep. 475, the facts were that plaintiff was introduced to the conductor of the train by the express messenger, as an express messenger learning the route; that the conductor, supposing him to be as represented, allowed him to ride in the baggage car without paying any fare. The baggage car was turned over, injuring the plaintiff seriously — for which he sued the company and recovered a judgment for \$22,500. The Supreme Court held that "the plaintiff

was not a *passenger*, within the true legal signification of the term, he did not get into or ride in any *passenger car*, and he did not pay or agree to pay any *hire* or *reward* for his passage."

Here plaintiff did not pay *any fare* but positively refused to do so — expressly refused to make a contract by which the relation of passenger and carrier would be established between him and the company.

The case of *Robertson v. N. Y. & E. R. R. Co.*, 22 Barb. 92, was one in which plaintiff, with knowledge that the engineer had no authority from defendant to permit him to ride upon the engine by the permission of the engineer did ride upon it and was injured, by reason of the negligence or want of skill of defendant's employees, while so riding.

The Supreme Court of New York held that "he was a wrong-doer the moment he stepped his foot upon the engine, and so continued until he was injured, and could not recover."

If a wrong-doer, it must have been because he had no right to ride on the engine. In the case at bar, plaintiff had no right to ride on that train on his one thousand mile ticket, and he knew it because the stipulation on the face, and the indorsements on the back of the ticket, were clear and explicit to that effect. He went into that car not intending to acquire a *right* to ride on that train, but to compel the conductor to pass him on a void ticket, or to make a case for a suit for damages. His entry into the car was made with an evil intent, and he is entitled to no favor, but only to the rights which the law gives a trespasser.

The cases cited by appellee's counsel as authorities for the position that plaintiff is to be regarded as a passenger do not support it. In 53 Ill. plaintiff entered the caboose car of a freight train, which, by a rule of the company, was forbidden to carry passengers, but sometimes did carry passengers, and there were passengers then on the train with tickets procured from the company.

Plaintiff tendered his fare to the conductor, who refused to receive it, and put plaintiff off the train.

The court held that he was a passenger. The difference between that and the case at bar is so palpable that it needs no comment, and an equally striking difference will be observed between this and the case in *Chicago & A. R. R. Co. v. Randolph*, 53 Ill. 510; s. c., 5 Am. Rep. 60; *Dunn v. Grand T. Ry.*, 58 Me. 187; s. c., 4 Am.

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Rep. 267; *Mobile & O. R. R. Co. v. McArthur*, 43 Miss. 180, and *O'Donnell v. Alleg. R. R. Co.*, 59 Penn. St. 239. If plaintiff had no right to ride on defendant's train, on that ticket, the conductor had a right to put him off; and not being a passenger, it makes no difference, whether at the station, or near a dwelling-house or not, because § 28 (Wagn. Stat. 307) has in that case no application. He had no right to use any more force than was necessary to eject plaintiff, but had a right to use as much force as was necessary for that purpose.

[Omitting some minor considerations.]

Judgment reversed and cause remanded.

The other judges concur.

INTERNATIONAL BANK OF ST. LOUIS V. FRANKLIN COUNTY.

(65 Mo. 105.)

County warrants — acknowledgment of indebtedness.

A county warrant, payable "out of any money in the treasury appropriated for county expenditures," is both a judicial ascertainment and a written acknowledgment of indebtedness by the county, and, if not paid, an action may be maintained on it whether there is money in the treasury to pay it or not.

ACTION on county warrants. The opinion states the facts.

John W. Booth, for appellant.

J. C. Kiskaddon, for respondent.

SHERWOOD, C. J. Action on ten county warrants made payable "out of any money in the treasury appropriated for county expenditures." The single issue tendered by the answer was contained in the denial that the warrants "were due and payable." Judgment went for plaintiffs. The motion in arrest having questioned the sufficiency of the petition necessitates an examination of its allegation; not to determine whether a demurrer would have been well taken, for we have no doubt on this score, but in order to determine whether the allegations are of such a nature as

will, with the intendments which the law will supply, be sufficient after verdict. The petition in brief states the drawing of the warrants in favor of and their delivery to Bauer, that subsequently for a valuable consideration plaintiff became the holder and owner of the warrants, presented the same to the treasurer for payment, which was refused because of no money in the treasury, and that fact duly indorsed on the warrants; that the same were duly registered by the treasurer, who, on the order of the county court, in the year 1871, paid plaintiff two years' interest on the warrants; that the warrants were due plaintiff and unpaid, and therefore judgment was asked.

[Omitting the question of plaintiff's title.]

The conclusion reached on these points must accomplish a reversal of the judgment, but inasmuch as a new trial may probably occur, it is thought best to discuss other matters.

It will be observed respecting warrants of the sort under consideration that the statute (1 W. S., § 32, p. 415) provides that "every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same." So that, according to express statutory provision, each warrant is an ascertainment that the sum therein mentioned is "*due*" to the person in whose favor the warrant is drawn. And it will be further observed that the preceding section (31) makes it the duty of the court before ordering their clerk to issue a warrant, to ascertain the "sum of money to be due from the county." In consequence of these provisions of the statute, it follows that each warrant, whether drawn on a *general* or special fund, for the statute makes no distinction, is both a judicial ascertainment and a written acknowledgment of indebtedness by the county. In short, it is to all intents and purposes the *promissory note* of the county. Abundant authorities, if indeed authorities are needed, where the expression of the legislative will is so plain, sustain this position. In *Terry v. City of Milwaukee*, 15 Wis. 490, where the action was brought on certain orders made payable out of any money belonging to the school fund, drawn on the city treasurer by the board of school commissioners, the law authorizing such orders to be thus drawn, and payment having been by the treasurer refused, it was said:

"The holder of these orders, it is claimed, stands in precisely the same relation to the city that a holder of a check upon a bank, drawn by a party having no funds in the bank, does in respect to

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the bank upon which it is drawn. It appears to us that this is an erroneous view of the subject. * * * The orders drawn by the officers of the school board are as much evidence of the indebtedness against the city as an order drawn by the mayor and clerk would be. * * * It is quite true that the law provides that the school fund shall be exclusively applied to the payment of the teachers' salaries and the other necessary expenses of the public schools; but suppose the fund is inadequate and insufficient to meet these expenses and discharge the orders of the school board, is there no remedy against the city? We have no doubt about the liability of the city on these school orders. And it is the duty of the city authorities to raise money to pay them, as much as to discharge any other just indebtedness against it. * * * If the city authorities neglect to exercise this power, or fail to levy and collect a revenue sufficient to meet its indebtedness, this is no reason why it should be relieved from all liability to those who have just claims against it for teaching its public schools. It seems to us there can be no doubt about the correctness of these principles of law."

In *Board of Commissioners of Floyd Co. v. Day*, 19 Ind. 450, it was held that: "The auditor of the county is authorized by law to audit claims against the county, and to draw his warrant or order upon the treasury for their payment. Such order when drawn is in legal effect the promissory note of the county." In *Clark v. Des Moines*, 19 Iowa, 199, Judge DILLON, speaking for the court, said: "It is claimed by the city that the warrants issued for road purposes are payable out of a 'particular fund,' and that the obligation to pay depends upon the existence and the sufficiency of the special fund. * * * There is nothing in the charter which favors the notion that the liability of the city for road debts is conditioned upon the existence of road funds in the treasury. For road debts the city is absolutely and unconditionally liable as for other debts. This liability cannot be controlled or varied by the form in which warrants may be drawn or worded by the municipal officers." In *Campbell v. The County of Polk*, 3 Iowa, 467, suit was brought on the county warrants, drawn payable out of any money not otherwise appropriated, and it was claimed on behalf of the county that the creditor in order to recover should allege and show that there was money in the treasury; but the court said: "It is as clear to us as any proposition can be that he should not be held to this.

He is obliged to have his claim settled by the county judge; the judge cannot pay the money, but is obliged to draw a warrant on the treasurer for it. Now, is there any reason or justice in saying that the creditor must allege and prove funds to be in the treasury, because he took a warrant, or because he took *such* a one? Upon a refusal to pay, he might return the warrant and sue on the original consideration, and then he would be relieved from that responsibility. In the opinion of this court these warrants were payable generally, and if there was no money in the treasury the county is answerable. All considerations of justice and of good law require this decision." To the same effect are *Lyell v. Supervisors, etc.*, 6 McL. 446; *Savage v. Supervisors, etc.*, 10 Wis. 49; *Paddock v. Symonds*, 11 Barb. 117. The soundness of the above doctrine cannot, we think, be successfully questioned. Nor can any good reason be shown why a county having, as in the present instance, given her written acknowledgments of indebtedness, should not occupy precisely the same footing as an individual would under like circumstances. If this be not so, of what avail is it to obtain a warrant at all? None whatever. In *Mansfield v. Fuller*, 50 Mo. 338, where the pay claimed for certain services would come "from the general revenue of the county," it was held that *mandamus* would not lie until the claim was first reduced to judgment; and in *State ex rel. White v. Clay County*, 46 Mo. 231, where the warrants were drawn payable "out of any money in the treasury appropriated for county expenses," it was held that the warrants being given for the ordinary indebtedness of the county, *mandamus* could not lie till judgment on such warrants was first obtained; and in *Howell v. Reynolds Co.*, 51 Mo. 154, where the warrants sued were of similar form to those in the case at bar, it was held in substance that the plaintiff could not recover without alleging and proving "that there were funds in the treasury out of which the warrants might have been paid, and that the treasurer refused to pay them out of such funds." So that in respect to warrants of this sort, the decidedly unique position is taken by this court, that you cannot have *mandamus* until you have *judgment*, and that you cannot have the latter unless there are funds in the treasury. In other words, that a warrant holder has no means of compelling the payment of his warrants, except in those cases where the *treasury* is *full* and compulsory process *altogether unnecessary*. The ruling in the last-mentioned case we regard as erroneous, and disapprove

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of the same, holding, as we do, that the warrants were due and payable, regardless of the fact whether there was money in the treasury for that purpose or not, and that had plaintiff in its petition, and on trial, showed title in the warrants, we should not reverse the judgment, but because this was not done the judgment is reversed and the cause remanded. All concur.

Judgment reversed.

WILLET V. BROWN.

(65 Mo. 128.)

Dower in partnership real estate.

A partnership bought and improved lands with the partnership funds, and held and treated them as partnership property. The title was taken in the individual names of the partners. One of the partners died, and the firm being insolvent, the lands were sold to pay the firm debts. *Held*, that the widow of the deceased partner was not entitled to dower in such lands. (*See note, p. 270.*)

SUIT for assignment of dower. The opinion states the facts.

A. Cornings, N. M. Givan and D. K. Hall, for plaintiff in error.

Wooldridge & Daniel, for defendant in error.

NORTON, J. This is a suit instituted by plaintiff, *Mary E. Willet*, as the former wife of one *Silas Price*, for the assignment of dower in certain lots in the town of *Harrisonville*, in *Cass county*, and for the recovery of damages for the forfeiture thereof. It is alleged that her former husband, *Silas Price*, was seized of an estate of inheritance in said lots, during their marriage, and that defendant by virtue of a sale of the same, made after the death of said *Price*, by him, as the administrator of the partnership estate of *S. Price & Co.*, conveyed said lots by administrator's deed, in *February, 1861*, to *Alexander Feely*, who afterward conveyed the same to *Barton Holderman*, who afterward conveyed to *Alexander McLorky*, who afterward, in *July, 1867*, conveyed to *Lititia Jones*, who afterward, in *December, 1867*, sold and conveyed the lots in question to the defendant *Robert A. Brown*.

Defendant, in his answer, alleged that the lots in which dower is demanded by plaintiff were purchased by the firm of S. Price & Co., a partnership composed of Silas Price and Charles Keller, with partnership funds for the purpose of said partnership. That they were treated, held, owned and considered by said firm as partnership property, and that after the death of said Silas Price, they were sold as stated in the petition by defendant as the administrator of the partnership estate of said Price & Company, for the purpose of paying partnership debts, and that said partnership estate was insolvent and insufficient to pay the debts of said firm. The replication denies all the averments of the answer except the one charging the insolvency of the firm of S. Price & Co., and on charging that the lots were sold to pay partnership debts. Upon a trial of the cause, the court rendered judgment for the defendant from which plaintiffs have appealed.

As the error complained of is based upon the action of the court in giving and refusing instructions, we copy them herein.

First. If the court, sitting as a jury, shall find from the evidence that the real estate in the petition described was purchased by the firm of Silas Price & Co., and conveyed to Silas Price and Charles Keller; that they composed the firm of Silas Price & Co.; that said real estate was paid for by said partners with partnership funds, then said Price and Keller thereby became the owners of, and held said real estate as tenants in common.

Second. If the court, sitting as a jury, further finds that said Price has departed this life, that plaintiff, Mary Willet, was the wife of said Price, the court, sitting as a jury, will find the issues for the plaintiffs, notwithstanding it may appear that said real estate was purchased by said firm and paid for out of the partnership funds, unless it shall further appear that it was purchased by said firm for its use in carrying on and transacting its partnership business.

The first of these instructions was given, the second was refused, and the court, of its own motion, gave the following:

The court, sitting as a jury, declares the law to be, that, though the said Silas Price and Charles Keller, composing the partnership firm of Price & Co., purchased the real estate described in the petition, with partnership funds, and by reason of such purchase held the same as tenants in common; yet they held the same in trust for the payment of partnership debts and liabilities; and if the

court finds from the evidence and the admissions in the pleadings that said property was purchased out of the partnership funds, to be used and applied to partnership purposes, and that the same was treated by said partners as a part of said partnership stock, and that said partnership was insolvent at the time of the death of said Price, and that it became necessary to sell said property, and the same was sold for the purpose of paying the partnership debts, then the plaintiff is not entitled to dower in the same, and the finding will be for the defendant.

The instruction given by the court of its own motion seems to be fully warranted by the cases of *Carlisle, Admr., v. Mulhern & Keyser*, 19 Mo. 56; *Duhring v. Duhring*, 20 id. 174. In the former case the question before the court was identical in principle with the one presented here. The contest was between the administrator of Carlisle, and Keyser, the administrator of the partnership estate of Carlisle & Keyser, as to the disposition of a fund, the proceeds of the sale of a leasehold interest in real estate which had been acquired with partnership funds of the firm of Carlisle & Keyser. GAMBLE, Judge, who delivered the opinion, observes: "It is insisted that, as the lease in this case was made to David Carlisle and Rufus Keyser, in their individual names, it was not partnership property. It appears sufficiently that these partners, being brick-makers and brick-layers, acquired their interest in the property by the advance of partnership money as an investment of so much of their partnership funds, to be held for their joint benefit. There has been some contrariety of decision in the English and American courts upon the question, of whether freehold estates in land purchased by a partnership with their joint funds became partnership property to be treated as a fund for the payment of partnership debts. Without a labored examination of these decisions, the result of the authorities may be stated to be that real estate purchased out of partnership funds to be used and applied to partnership purposes, and treated and considered by the partners as partnership stock, is to be deemed and considered, so far as the legal title is concerned, as estate held in common and not in joint tenancy; but as to the beneficial interest it is held in trust, each holding his property in trust for the partnership until the partnership account is settled and the partnership debts are paid. It is a trust arising from actual or implied agreement of the parties, and from the mutual relation in which they stand to each

other." It is true that there was no question of dower in that case, but the declaration of the court that the estate, although held by the partners as tenants in common, was chargeable in their hands with a trust for the benefit of creditors, and the payment of partnership debts would preclude dower and the claim of the heirs of either of the tenants in common, until the partnership accounts were settled and partnership debts paid. So also, in the case of *Duhring v. Duhring*, 20 Mo. 174, it was declared by RYLAND, Judge, "that the widow was not endowable of real estate belonging to the firm which was purchased by the partners for partnership purposes with partnership funds. The real estate purchased by the partners must be considered, so far as is necessary to pay the debts of the firm, partnership stock and liable to the rules and regulations incident to personal property." After an exhaustive review of the authorities, to many of which we have been cited in this case, the court reach the conclusion announced, that when lands are purchased by partners with partnership funds for partnership purposes, the policy of the law and principles of justice are against the right of the wife to dower in such lands, and the weight of authority, both English and American, is decidedly against such right. The leading authorities to which we have been cited by counsel were extensively reviewed by the court in the above case, and in remarking upon the doctrine laid down in the case of *Smith v. Jackson*, 2 Edw. Ch. 28; *Thornton v. Dixon*, 3 Bro. Ch. 199; *Bell v. Phyn*, 7 Ves. 453; *Balmain v. Shore*, 9 id. 500, that an agreement between the partners was necessary to be shown that real estate of the partnership should be treated as personalty before it could be so treated, RYLAND, J., observes that he doubts the accuracy of that ruling and approvingly quotes from 3 Kent, 38, where it is said: "The decisions maintaining this doctrine appear to me to be a sacrifice of a principle of policy, and above all of a principle of justice to a technical rule of doubtful authority. There is no need of any other agreement than what the law will necessarily imply from the fact of an investment of partnership funds by the firm in real estate for partnership purposes. If the partners mean to deal honestly, they cannot have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts. -

The instruction given by the court of its own motion incorporated the principle above announced; for as a pre-requisite to a

finding for defendant, it required that the court should first find that the real estate was purchased with partnership funds for partnership purposes, that it was treated by said partners as a part of the partnership stock, that the partnership was insolvent and that the real estate was sold to pay its debts. It is, however, said there was no evidence that the lots in question were bought for partnership purposes, and for that reason the instruction should not have been given. If the evidence of Keller, the other partner, was alone to be considered, there might be some force in the objection. He swears that the lot in question was bought with the money of the firm, that a two-story house was built upon it with partnership funds, which he occupied as a residence, that there was no agreement between him and Price that it should be considered partnership property, and that it was not considered partnership stock, that the partnership was formed to engage in mercantile pursuits; that there were no written articles of partnership and no agreement to engage in buying real estate. On the other hand the bill of exceptions which does not contain a detailed statement of the evidence of defendant states that it tended to prove that the lot in question, and a large number of other lots and farming lands were bought by Price & Keller, paid for out of the partnership funds and were conveyed to Silas Price and Charles Keller, and were by them considered and spoken of as partnership property. The evidence seems to establish the fact that the partnership was formed in 1848, that the lot in question was purchased with partnership funds, and improved out of the same funds in 1852, that the partnership was dissolved by the death of Price in 1859; that during its continuance other lots and farming lands were purchased with partnership funds and conveyed to Silas and Charles, and were treated and considered by them, as well as the lots in controversy, as partnership property, and that all of the real estate thus purchased was sold to pay partnership debts, that in dispute having been sold for that purpose in 1861, the estate of the partnership being wholly insolvent. Now, if Price & Keller treated, considered and held out to the world the real estate thus bought and improved with the money of the firm, as property and assets of the partnership, and impressed upon it by their own acts the liabilities incident or attaching to partnership property, their heirs and representatives ought not to be heard in a complaint, that a court of equity should not recognize and enforce a trust which the ances-

tor by his conduct had impressed upon the property. An agreement between Price and Keller to buy real estate for the use and purposes of the firm might very well be inferred from what was said by the partners, and that they considered and treated it as partnership property or assets of the firm.

[Omitting a statutory ground.]

Judgment affirmed with the concurrence of the other judges, except SHERWOOD, C. J., absent.

Judgment affirmed.

NOTE BY THE REPORTER.—It is the settled American doctrine that real estate purchased with partnership funds for the use of the partnership and employed in the partnership business is in equity regarded as assets of the partnership, and will be applied to the liquidation of partnership, in preference to individual liabilities. *Futichild v. Futichild*, 64 N. Y. 471; *Uhler v. Semple*, 20 N. J. Eq. 288; *Bryant v. Hunter*, 6 Bush, 75; *Lime Rock Bank v. Phetplace*, 8 R. I. 56; *Lang v. Waring*, 25 Ala. 625; *Full River Whaling Co. v. Borden*, 16 Cush. 458; *Sigourney v. Munn*, 7 Conn. 11; *Davis v. Christian*, 15 Gratt. 11; *King v. Weeks*, 70 N. C. 372; *Price v. Hicks*, 14 Fla. 555; *Matlock v. Matlock*, 5 Ind. 408; *Bopp v. Fox*, 68 Ill. 540; *Russell v. Miller*, 26 Mich. 1; *Willis v. Freeman*, 35 Vt. 44; *Dupuy v. Leavenworth*, 17 Cal. 282; *Hunt v. Benson*, 2 Humph. 459; *Jarvis v. Brooks*, 27 N. H. 37; *Blake v. Nutter*, 19 Me. 16; *Scruggs v. Blair*, 44 Miss. 406; *Hewitt v. Rankin*, 41 Iowa, 35; *Drewry v. Montgomery*, 28 Ark. 256; *Fowler v. Bailey*, 14 Wis. 125.

There are many distinctions drawn in many cases, arising out of considerations of evidence, etc., but the doctrine is as above stated whenever the three above requisites unite, namely, purchase with partnership funds, purchase for partnership use, and use in the partnership business.

For a learned treatment of the subject, see Coll. Part., Wood's Notes, p. 219, n.

This subject has been very clearly and conclusively treated by the New York Court of Appeals in *Futichild v. Futichild*, *supra*. The court there say:

"But looking at the real nature of the transaction, as found by the judge, it seems to me more reasonable to hold that this property should be regarded as assets of the copartnership. The findings are explicit that it was purchased and paid for as partnership property, and always treated as its property in the payment of taxes and incumbrances, making improvements, etc. Real estate purchased for partnership purposes, and appropriated to those purposes, and paid for by partnership funds, becomes partnership property, and it is not material in what manner or by what agency the land is purchased, or in what name it stands. If it be established that it belongs to the partnership, equity will hold the one in whom is the legal title as trustee for the partnership. *Parsons on Partnership*, 263. When the land is conveyed to the several partners it is not indispensable that it should actually be used for partnership purposes, nor that a positive agreement should be proved making it partnership property. If it has been paid for with partnership effects it is then a question of intention, whether the conveyance is to have its legal effect, and the parties are to be treated as tenants in common, or whether the land is to be treated as partnership property. The manner in which the accounts are kept, whether the purchase-money was severally charged to the members of the firm, or whether the accounts treat it the same as other firm property, as to purchase-money, income, expenses, etc., are controlling circumstances in determining such intention, and from these circumstances an agreement may be inferred. *Columb v. Read*, 24 N. Y. 521. The rule, I apprehend, is the same in this respect when the deed is made in the individual name of one of the partners, as where it is made in the names of all the members of the firm. But a distinction is claimed to exist between creditors and the members of the firm, and between the members themselves in respect to the proof necessary to establish the fact that the real estate is partnership property. I do not think such a distinction is recognized by the authorities. In this country, real estate belongs to a partnership, for the purpose of paying the debts and

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adjusting the equities between the members of the firm, is treated as personal property; and what remains is considered and treated as real estate, which would go to the heirs of the partners according to their interests. This conclusion was reached by the chancellor in an elaborate opinion in *Buchan v. Sumner*, 3 Barb. Ch. 165-200, reviewing all the American authorities; and was approved and adopted by this court in *Collumb v. Read*, 24 N. Y. 505. The English rule gives to the real estate of a partnership the character and qualities of personal property as to all persons; and the remainder, after paying debts and adjusting the equities of the partners, goes to the personal representatives, and not to the heir, probably on account of the great injustice which would result from the laws of inheritance in England. *Collumb v. Read*, 24 N. Y. 505; *Parsons on Partnership*, 370. But the American rule, that the remainder descends to the heir, does not affect the character of the property as partnership effects, except that the incidents and qualities of real estate are revived. It is divided as so much capital would be, but it resumes its original qualities. *Id.* 385. The same evidence, however, which would make it partnership property for the purpose of paying the debts and adjusting the equities between the co-partners would establish it for the purpose of final division. It would be incongruous to say that evidence which would be sufficient to establish that it was partnership property for the former purposes would fail for the latter purpose, and I can find no authority for such a distinction. Such a rule, while compelling one member of a firm holding the legal title as trustee for the partnership, to account and disgorge to the extent of making the accounts equal between the members of the firm, when that was accomplished, would enable him to rob his associates by pocketing the remainder."

The court then consider the question whether such an agreement can be proved by parol within the statute of frauds, and conclude that "real estate purchased as partnership property is not within the prohibition of the statute," not only because the consideration is not paid by "one" but by all, but more substantially because "property thus held is regarded as personal property, for the purpose of paying the debts and adjusting the equities between the partners; and the individual member holding the legal title is a trustee for the partnership in respect to the property as personalty; and when the debts are paid, and the claims of the several members as between themselves paid, the trust for the partnership is discharged, and a trust results to the other members of the firm, and the heirs of such as have died, by operation of law, which is saved by section 50 of the statute, and the holder of the legal title then becomes a trustee of such remainder, as real estate for the benefit of persons interested."

STATE V. STEELEY.

(65 Mo. 218)

Criminal law — indictment — time, place, and parties.

An indictment for murder charged that "on or about the — day of —, A. D. 1871, at the county of Jasper and State of Missouri," defendant and W. S. "made an assault on H. S. with pistols," which "they, said John and William, in each of their right hands had and held, and did then and there unlawfully," etc., "and of his malice aforethought, shoot off and discharge at," etc., "and of the mortal wounds inflicted upon him the said H. S. did then and there instantly die." *Held*, to state time and place with sufficient certainty, and to charge a joint offense.*

* In *State v. Lakey*, 65 Mo. 217, it was held that an indictment for murder, which stated the time and place of the assault, but in stating the death, charged that of the wound the deceased "did instantly die," was bad in not stating the time and place of the death.

INDICTMENT for murder. The opinion states the case.

Robinson and Bray & Cravens, for appellant.

J. L. Smith, attorney-general, for the State.

HENRY, J. At an adjourned term of the Circuit Court of Jasper county, held in December, 1875, the defendant was indicted jointly with William Steeley for the murder of Harvey Sitton, and at the same term, on his application, a change of venue was awarded to Dade county. At the April term of the Dade Circuit Court there was a trial of the cause, which resulted in the conviction of defendant of murder in the first degree, and judgment was entered accordingly, from which defendant has appealed. A motion to quash the indictment was overruled, and this is assigned as error. The grounds of objection to the indictment are that it does not, with sufficient particularity, allege when and where Harvey Sitton died of the wounds, which, it was charged, were inflicted upon him by the defendant, or when the act of shooting was done; *second*, that it is uncertain whether defendant or William Steeley is charged to have committed the offense.

The indictment charges that on or about — day of —, A. D. 1871, at the county of Jasper, in the State of Missouri, John and William Steeley made an assault upon Harvey Sitton with certain pistols, which they, said John and William, in each of their right hands had and held, and did then and there shoot off and discharge at, upon, etc. It alleges that John and William Steeley did then and there, on purpose, etc., and of *his* malice aforethought, shoot off and discharge, etc. It alleges that of the mortal wounds inflicted upon him, "the said Harvey Sitton, did then and there instantly die." Neither the case of *Lester v. The State*, 9 Mo. 658, nor the *State v. Sides*, 64 id. 383, sustains the objections to this indictment. The language of the indictment in *Lester v. The State* was "of which the said Scott did instantly die," and in the *State v. Sides* the language was that deceased "did immediately languish, and languishing did die." In the case at bar, the indictment states when the wounds were inflicted upon the deceased, and where it occurred, and the word "then" has relation to that time, and "there" to the place previously stated. It contains the very words which NAPTON, J., held, in *Lester v. The State*, would have

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made the indictment good in that case. The word used in the *State v. Sides*, "languish," imports that the death was not instantaneous, and the deceased may have languished more than a year and a day before he died, and the averment in the indictment have been true.

It is urged that it is not clear whether it charges that defendant or William Steeley committed the offense, but we think it sufficiently clear that both are charged. It is alleged that each had a pistol in his hand, and substantially that each of his malice did the shooting. The ambiguity arises from the use of the words "his malice," instead of "their malice;" but a reasonable construction of the charge, taking all the allegations together, removes the obscurity and makes it sufficiently clear what was meant. Although inartificially drawn, the indictment is substantially good, stating all the facts necessary to constitute the crime of murder in the first degree, and in proper language. It is not like the indictment held bad in the case of the *State v. Gray*, 21 Mo. 492. Several were there indicted, and it was charged that *they*, with a knife which *they* then and there with their right hand held, made an assault, etc. SCOTT, J., said: "This is an impossibility. It is on the face of it false, and must be bad." In the case at bar the charge is that each had a pistol in his right hand and made the assault, etc.

[Omitting a statutory ground, upon which the judgment was reversed and the cause remanded.]

Reversed.

DUDLEY v. MCCLUER.

(35 Mo. 241.)

Evidence of good character — when admissible.

A charge in the petition, that the defendant has made false and fraudulent representations, does not warrant the introduction by the defendant of evidence of good character in action to set aside a settlement.

ACTION to set aside a settlement. The opinion states the facts.

Bray & Cravens, for appellant.

C. W. Thrasher & H. C. Young, for respondent.

HENRY, J. This was a suit in the Greene Circuit Court, commenced in October, 1873. Plaintiff in his petition states that in December, 1859, defendant McCluer, and George R. and Clark Barrett, executed their note to Hash & Dudley, a firm composed of John Hash and Pulham Dudley, for \$1,050, payable April 1, 1860, with ten per cent interest per annum from its maturity; that on a settlement of the partnership, the note in question became the property of said Pulham Dudley; that on the 28th day of January, 1866, said McCluer falsely and fraudulently represented to said Dudley that he had paid a number of debts specified in the petition, on which he had been garnisheed as the debtor of said Hash & Dudley, amounting to within \$414 of the amount of said note executed by him to Hash & Dudley, and induced said Dudley to accept, in satisfaction of said note, \$414, and to deliver up the note to defendant; that said Dudley assigned said demand to plaintiff, who asks that said settlement be set aside, and for judgment for the balance of said note and interest. Defendant, in his answer, denies all of the allegations, except the execution of the note and the payment of the \$414 in satisfaction of the same; states that he was garnisheed before said settlement, in several suits against said Dudley & Hash, including those named in the petition; that said Dudley and defendant went to the office of the justice of the peace in which said attachment proceedings were pending, and procured a list of said demands, when said Dudley offered to take \$414 in full settlement and satisfaction of said note, which defendant accepted, and that he then paid Dudley that amount and took up the note. For a further defense he states that he signed said note one year after its maturity, without receiving any consideration therefor, and that Pulham Dudley knew it at the time of the settlement and also relied on the statute of limitation as a bar to the action. The replication states a sufficient consideration for the execution of the note by defendant, and a state of facts which avoids the plea of the statute of limitations and as there was abundant evidence to support the replication in those respects, and appellant does not urge those defenses here, no further notice will be taken of them. The cause was tried at the May term, 1875, by the court without the intervention of a jury, a jury not having been waived by plaintiff, and the finding was for defendant, and judgment accordingly, from which the plaintiff has appealed to this court.

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Plaintiff contends that it was a proceeding in equity, and that this court can and should review the evidence in the cause. We have but to say in regard to this point, that it was either a suit in equity or the court committed an error in trying it without the intervention of a jury, but as it was treated by the court and the counsel on both sides, as an equitable proceeding and so tried without objection from either side, without examining the numerous authorities cited by the counsel, we shall regard it as a suit in equity, but, inasmuch as for an error which will be presently adverted to, the judgment will be reversed and the cause remanded, we shall express no opinion as to the correctness of the finding of the court on the evidence. The court did not err in admitting as evidence, transcripts of the records in the attachment suits, but did err in permitting defendant, before any attempt was made to impeach it, to introduce witnesses to testify to his good character. His character was not in issue. It is true he was charged in the petition with having made false and fraudulent representations, and the charge was calculated to affect his character indirectly, and so in every case where one is sued for a debt, and he denies it, or pleads payment, his character is somewhat involved in the investigation; but "putting character in issue is a technical expression which does not mean simply that the character may be affected, but that it is of particular importance in the suit itself, as the character of plaintiff in an action of slander, or that of a woman in a suit for seduction. *Porter v. Seiler*, 23 Penn. St. 424. In those excepted cases, character affects the amount of the recovery. The jury are, by law, permitted to consider it in assessing damages, and it is in that sense that it is said that "the nature of the action puts the character in issue." *Fowler v. Aetna Ins. Co.*, 6 Cow. 674; *Humphrey v. Humphrey*, 7 Conn. 116; *Gough v. St. John*, 16 Wend. 646. In the case of *Humphrey v. Humphrey*, *supra*, the defendant in a suit for a divorce was charged with adultery, and the court held that evidence of her good character was inadmissible, although the evidence against her was circumstantial only. In *Gough v. St. John*, the suit was for a false and fraudulent representation of the solvency of a third person, and it was held that evidence of defendant's good character should not be received. Prof. Greenleaf, in his work on Evidence, Vol. 1, § 54, remarks, that "generally in actions of tort, wherever the defendant is charged with fraud from mere circumstances,

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evidence of his general good character is admissible to repel it," but KNOX, J., in *Porter v. Seiler*, 23 Penn St. says: "he is not sustained by any authority I can find save *Ruan v. Perry*, 3 Caines, 120, and this is expressly overruled in 16 Wend." We may add that the case of *Fowler v. The Atina Ins. Co.*, 6 Cow. 673, seems to sustain Greenleaf, but is an authority against the admissibility of the evidence of character when the evidence of fraud is direct and not circumstantial. See, also, *Rogers v. Lamb*, 3 Blackf. 155; *Givens v. Bradley*, 3 Bibb, 195; *The Attorney-General v. Bowman*, 2 Bos. & Pul. 532, note a; *Anderson v. Long*, 10 Serg. & R. 55. With the concurrence of the other judges, except SHERWOOD, C. J., not sitting, having been of counsel, and NORTON, J., not sitting, the judgment is reversed and the cause remanded.

Judgment reversed.

JOHNSON V. BEAZLEY.

(25 Mo. 250.)

Jurisdiction — probate courts.

Probate courts are courts of record, with general, original and exclusive jurisdiction in respect to the administration of the estates of deceased persons, and on these subjects their adjudications are conclusive in collateral proceedings, like the adjudications of other courts of record.

In ejectment, the defendant claimed under a deed of the administrator of J. S., appointed by the probate court of C. county. *Held*, that the plaintiff could not show that the probate court had not jurisdiction to make such appointment because J. S. did not reside in C. county. (*See note, p. 286.*)

EJECTMENT. The opinion states the facts.

J. R. Arnold, for plaintiff in error.

J. C. Kiskaddon, for defendant in error.

HENRY, J. Plaintiffs brought ejectment against defendant for a tract of land situate in the county of Crawford, described as follows: "The north-east quarter of section thirty, township thirty-six, range four, west." Both parties admitted title in one Thomas J. Higginbotham, and it was agreed that plaintiffs are his heirs at

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law. Defendant claimed, under a deed from H. C. Scott, the administrator of the estate of said Higginbotham, made on a sale of said land, under and in pursuance of an order of the probate court of Crawford county of the December term, 1866. The land was sold by said administrator on the 19th day of March, 1867. At the next term of said court, June, 1867, the administrator's report of said sale was approved by the court, and on the 12th day of June, 1867, he executed a deed for the premises to defendant. To the admission of this deed in evidence plaintiffs objected, on the ground that it did not appear by said deed "that the probate court of Crawford county had jurisdiction of the estate of said Higginbotham, or that said court had authority to appoint H. C. Scott to take charge of the same; that it appeared by said deed that the land was appraised by only two householders; that there was no evidence of the appointment of Scott as administrator of said estate." These objections were overruled, and the deed was read, as evidence, to the jury; and this was all the evidence offered by defendant. Plaintiffs then offered to prove, by competent witnesses, that at the time of his death said Higginbotham resided in the county of Dent, and that he never resided in Crawford county. This was objected to by defendant and excluded by the court. But inasmuch as, in their testimony in chief, plaintiffs had been permitted, without objection, to prove the same fact, we shall take it for granted that Higginbotham did, at his death, reside in Dent county. There was a judgment for defendant, and plaintiffs have brought the cause to this court by writ of error.

The three alleged errors are: that it does not appear that the probate court of Crawford county had jurisdiction of the estate of Higginbotham, or that the court had authority to appoint Scott administrator of his estate; that it appeared by the deed that the land was appraised by only two householders; that there was no evidence that Scott had ever been appointed administrator.

[Omitting the second and third points.]

The remaining question is one of considerable difficulty. Some of the ablest courts in the United States have held the doctrine contended for by the plaintiffs in error, while others, of equal ability, have ruled otherwise. The decisions of our own court are not in entire harmony with each other, and in several of our sister States the same vacillation will be observed in the adjudications on

this subject. In this perplexing conflict of authority, we can but weigh the authorities and arguments, and incline, as in our judgment, they preponderate.

The 12th section of article 5 of the Constitution of this State, in force when the probate court of Crawford county was established, was as follows: "Inferior tribunals shall be established in each county for the transaction of all county business, for appointing guardians, for granting letters testamentary and of administration, and for settling the accounts of executors, administrators and guardians." By the act of the General Assembly creating this court (Sess. Acts 1855, page 499), exclusive original jurisdiction was conferred upon it, in all cases relative to the probate of last wills and testaments, granting letters testamentary and of administration, settling and allowing accounts of executors and administrators, and determining all disputes and controversies whatever, respecting wills and the right of executorship and administration. By the fifth section, it was made a court of record, and true and faithful records of its proceedings were required to be kept. By section 3, article 1 of the administration law, it is provided that "letters testamentary and of administration shall be granted in the county in which the mansion or place of abode of the deceased is situated. If he had no mansion house and be possesseed of lands, letters shall be granted in the county in which the land or the greater part thereof lies, etc." The assumption upon which is based all the argument for holding the record as a nullity is, that the county and probate courts of this State are of inferior and limited jurisdiction, although expressly made courts of record by the statute, with exclusive original jurisdiction over the subjects committed to them, and although the Constitution of the State provided for their creation, and, in general terms, defined the jurisdiction that was to be conferred upon them. It is unnecessary to refer to cases decided by this or other courts, in regard to special jurisdiction confided by statute to justices of the peace or to Circuit Courts, wherein those courts had no jurisdiction of the subject, except as conferred and restricted by the statute. In such cases it is well settled in this State, that the jurisdiction of the court must appear in the record, and that, if it do not so appear, the judgment may be attacked in collateral proceedings. The case of *Lacey v. Williams*, 27 Mo. 280. was one in which a guardian was appointed for an infant not residing in the county where the appointment was made, but owning

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land therein, and it was a direct proceeding to remove the guardian so appointed. It is clear that in that case the court had no such power as it exercised, but the main question in this was not raised in that case, and it is no authority for the position here taken by the plaintiffs in error. It is not intimated in the opinion of the court that the action of a probate court upon a subject-matter confided to it occupies any different position from that of the Circuit Court upon a subject-matter over which it has general jurisdiction. That the probate court of Crawford county, in the case we are considering, erred in the appointment of an administrator of the estate of Higginbotham, who resided and had his mansion in the county of Dent, although he owned land in the county of Crawford, is clear; but the appointment having been made, the presumption is that the matter has been considered and determined by the court, and until the contrary appears in a direct proceeding in that court, or some higher court to which an appeal lies, the record of the appointment will be conclusive, in all collateral proceedings. The jurisdiction of probate courts is not, like that of justices of the peace, confined to special cases in which the jurisdiction must appear, but their jurisdiction pertaining to wills and administrators is general. The subjects of their jurisdiction are clearly defined, and any action of theirs outside of such subjects would be of no force or validity, and the same may be said of the Circuit Court; but their action, on subjects exclusively and originally confined to them, is entitled to the same weight as that of any other court of record.

It is insisted that the appointment of H. C. Scott as administrator of Higginbotham's estate is to be treated as a nullity, because there is no record showing the fact that the deceased resided at the date of his death in Crawford county, in other words, that the record must show facts which authorized the action of the probate court; not merely that an administrator was appointed, but that all the requirements of the statute had been duly complied with. The statute provides that if the deceased had no mansion house, or place of abode at the time of the death, but owned land, letters should be granted in the county in which the greater part of the land lies; and the argument made here would be equally good in the case of an appointment of an administrator of one deceased who had no domicile, if the record did not expressly show that the greater part of the lands were in the county in which the appointment was made

—and yet this would not be seriously insisted upon. In the case at bar, if the position taken by the plaintiffs in error is correct, it was wholly unnecessary to prove that Higginbotham resided, and had his mansion house in Dent county; for the argument is that, unless the record shows, either that the deceased resided and had his mansion house in Crawford county, or had no residence or mansion house, but owned lands, and that the greater part of said lands were in Crawford county, the appointment is to be treated as a nullity. The case of *Schell v. Leland*, 45 Mo. 294, is not an authority for the doctrine contended for by plaintiffs in error. The Kansas city Court of Common Pleas was by the terms of the act creating it, expressly limited on the subject-matter of mechanics' liens to the township in which it was located, and it was held that, when in that court a lien was attempted to be enforced, the record must show that the property against which the lien was sought to be enforced, was in Kaw township. It was a local court confined in its jurisdiction to Kaw township, an inconsiderable portion, geographically, of the county of Jackson. Such a court is not to be treated as occupying the same position as probate courts, which by the statute "have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting letters testamentary and of administration, etc.," and whose jurisdiction is co-extensive with the respective counties for which they are created. The case of *Bryan v. Mundy*, 14 Mo. 459, originated on a motion in the probate court, two years after a demand was allowed and classified by that court, to set it aside, on the ground that the administrator had no notice that such demand would be presented for allowance. The record did not show that he had notice and there was evidence tending to show that, in fact, he had no notice. That it will be perceived was a direct proceeding to set aside the judgment, between the original parties to the suit, no rights of third persons intervening; and although the doctrine of that case, as Judge SHERWOOD observed in *Brooks v. Duckworth's Adm'r*, "has been very often doubted," yet, admitting it to be correct, it comes far short of sustaining the doctrine here insisted upon. A careful analysis of the case of *Valle v. Fleming*, 19 Mo. 454, we think, will show that it does not conflict with the doctrine we have endeavored to maintain. Judge SCOTT says, in that case, "that the County Courts have no other jurisdiction than that which is specifically conferred on them by statute. They have no common

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law jurisdiction, nor can they be said to be courts of general jurisdiction, in whose favor, by the common law, the liberal intendments are indulged, which are extended to courts of that character. But the great mischief which experience has shown arises from avoiding sales made under the authority of tribunals having jurisdiction of the subject, have induced courts to extend an enlarged liberality of construction to proceedings instituted for such purpose, with a view to uphold them. As to these proceedings the presumption extended to courts of general jurisdiction is indulged." In that case the record affirmatively showed that no notice had been given, and Judge SCOTT says, "How then can a notice be presumed when the record on its face shows that it was impossible, in the nature of things, that it could have been given." The same distinguished judge said, in *Riley's Adm'r v. McCord's Adm'r*, 24 Mo. 267, "an illegality in the grant of letters of administration cannot be taken advantage of in a collateral proceeding. They must be regarded as valid until they are regularly revoked." In *Strouse v. Drennan*, 41 Mo. 289, this court held a different doctrine. It is there said that "our county and probate courts are not courts of general jurisdiction, according to the common-law meaning of the term, in which such liberal intendments are indulged, for they have only limited jurisdiction which is especially conferred on them by statute." To the same effect is *Gibson v. Vaughn, Adm'r, etc.*, 61 Mo. 418. We think, after a careful review of the authorities, that those are not in harmony with the best considered cases in this country, and should be overruled. The case of *Brooks v. Duckworth*, 59 Mo. 49, is an express decision of this court on the point under consideration. It was there held that on a presentation of a demand to the county court, for allowance against an estate, the jurisdiction of that court to pass on its validity at once arose, and the conclusion of the court upon the evidence, and all other matters to be adjudicated, could not be attacked collaterally.

In *Kemp's Lessee v. Kennedy*, 5 Cranch, 173, MARSHALL, C. J., said: "All courts from which an appeal lies are inferior courts, in relation to the appellate court before which their judgment may be carried, but they are not, therefore, inferior courts in the technical sense of those words. They apply to courts of special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United

States are all of limited jurisdiction, and their proceedings are erroneous if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities." In *Griffith v. Frazier*, 8 Cranch, 9, MARSHALL, C. J., observed: "To give the ordinary jurisdiction, a case in which, by law, letters of administration may issue, must be brought before him. In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authorities, because he had power to grant letters of administration in the case." To the same effect is the case of *McNitt v. Turner*, 16 Wall. 353. A statute of Illinois provided that "in all cases where the intestate shall have been a non-resident, or without a widow, next of kin, or creditors in this State, but having property within the State, administration shall be granted to the public administrator of the proper county, and to no other person." The probate justice of Adams county appointed Archibald Williams administrator of the estate of Samuel Spotts, deceased, and, as such administrator, he applied to the Circuit Court of said county, and procured an order to sell certain tracts of land of which said Spotts died seized. The proceedings of the probate court did not show that Williams was public administrator, nor did they show that there was no such officer in the county at the time. Justice SWAYNE, delivering the opinion of the court, said: "It does not appear that Williams was not the public administrator, and, if he were not, that there was any such officer for Adams county at that time. If there was not, the appointment of Williams was proper. Error must be shown. It is not to be inferred, except where the inference is inevitable. Every thing consistent with the record which would have warranted the appointment will be presumed to have existed, and to have been found and acted upon by the court. Acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter." To the same effect are the cases of *Grignon v. Astor*, 2 How. 319; *Kennedy et al. v. Georgia St. Bank*, 8 id. 586, and *McCormick v. Sullivant*, 10 Wheat. 199.

Propst v. Meadows, 13 Ill. 157, was the case of an allowance of a demand against an estate, which it was sought to avoid on the ground that the executor had no notice of the proceeding. CATON,

J., delivering the opinion of the court, said: "Considering, as we do, that this judgment was not conclusive upon the executor, for want of notice to appear and defend, the question arises, in what way he may obtain relief against the effects of the adjudication. We are not now prepared to say that this judgment was an absolute nullity from the omission of the record to show a notice to the executor. The county court, although of limited, is not, strictly speaking, of inferior, and certainly is not a court of special jurisdiction. It is a court of record, and has a general jurisdiction of unlimited extent over a particular class of subjects, and when acting within that sphere, its jurisdiction is as general as that of the Circuit Court. When, therefore, it is adjudicating upon the administration of estates, over which it has a general jurisdiction, as liberal intendments will be granted in its favor as would be extended to the proceedings of the Circuit Court; and it is not necessary that all the facts and circumstances which justify its action should affirmatively appear upon the face of its proceedings." In *Wight v. Wallbaum*, 39 Ill. 563, it was held that "where a court has jurisdiction of the subject-matter and of the parties, its judgment must be held conclusive, in all cases, except in a direct proceeding for its reversal." That was a case in which it was urged that the failure of the probate court to observe the requirements of the law, in granting letters of administration with the will annexed, rendered the appointment void.

The case of *Cutts v. Hoskins*, 9 Mass. 543, very similar in its facts to the case at bar, and in which it was held that a grant of letters by the probate court of one county, when intestate had died in another, which was prohibited by their statute, was a nullity and might be attacked in a collateral proceeding, was reviewed and its doctrine condemned by the learned judge who delivered the opinion of the court in *Wight v. Wallbaum*, *supra*. *Schroyer v. Richmond & Staley*, 16 Ohio St. 455, and *Dequindre v. Williams*, 31 Ind. 445, fully sustain the views expressed by WALKER, Judge, in *Wight v. Wallbaum*. In *Schroyer v. Richmond*, SCOTT, C. J., observes, "whilst the statute requires the record to contain 'an entry of the appointment' of all guardians, it nowhere requires that the record shall show the existence of a state of facts such as to warrant the exercise of its authority, or the evidence upon which the court relied, in making the appointment. Nor does any rule of law require this of such a court. True, it is a court of

limited jurisdiction, and it is equally true that the jurisdiction of each of the courts of the State is expressly limited, either by the Constitution or by statute. But as was said in the case of *Sheldon v. Newton*, 3 Ohio St. 500, "the distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment, without setting forth the facts and evidence on which it is rendered, and whose records, when made, import absolute verity, and those of an inferior grade, whose decisions are not of themselves evidence, and whose judgment can be looked through for the facts and evidence necessary to sustain them." *Kimball v. Fisk*, 39 N. H. 110, is in harmony with the cases in Ohio, Indiana, Illinois and the Supreme Court of the United States. The distinction is not between courts whose proceedings are, and courts whose proceedings are not, according to the courts of common law; but between courts of record which have, and, in the particular case, exercise their general original jurisdiction, and courts not of record—courts of record, which have a limited and special jurisdiction, and courts of record having original general jurisdiction, but which, in the particular case, exercise a limited jurisdiction, not within the scope of their general jurisdiction.

In a note to *Roderigas v. East River Savings Institution*, reported in the American Law Register, Vol. 5, No. 4, 213, Judge REDFIELD says: "There is no very good reason why the jurisdiction of courts of probate, so far as it depends upon domicile within a particular district within the State, should be allowed to be attacked collaterally and all the proceedings rendered nugatory. But the decisions to this extent are very numerous, and have never been questioned to our knowledge." Again he says: "There is no controversy, we believe, or has been none heretofore, that courts of probate, whose jurisdiction is created and defined by statute for the settlement of estates, within particular defined districts, must be regarded both as inferior courts, and of special and limited jurisdiction, and that no presumption could be made in favor of their jurisdiction beyond what appears on the face of their proceedings, and that even where that appeared regularly it might be contradicted in any collateral proceeding, and the whole action of the court rendered nugatory and void for all purposes." If we comprehend the statement of this eminent author, it strikes us as most remark-

able, in the face of the numerous decisions we have cited, from Ohio, Indiana, Illinois, New Hampshire, the Supreme Court of the United States, and to which we now add *Fisher v. Bassett*, 9 Leigh, 119; *Den ex. Dem. Obert v. Hammel*, 18 N. J. Law, 75; and *Hahn v. Kelley*, 34 Cal. 391. In nearly all of these cases, it was expressly held that the judgment of a court of record having general jurisdiction over administrations, etc., could not be attacked in collateral proceedings, and for more than half a century there has not only been a *controversy* on the subject mentioned by Judge REDFIELD, but the weight of authority overwhelmingly sustains the views we have herein expressed, and which are so ably maintained in the cases to which we have referred. *Langworthy v. Baker*, 23 Ill. 484, cited by Judge REDFIELD, does not sustain his position. It was a direct and not a collateral proceeding. It was a writ of error prosecuted for the express purpose of having the judgment of the probate court reversed by the Supreme Court, and BREESE, J., who delivered the opinion of the court, cites approvingly *Propst v. Meadows*, *supra*. In the case of *Roderigas v. East River Savings Inst.*, 63 N. Y. 460; 20 Am. Rep. 555, the Court of Appeals of New York held that the appointment, by a probate court, of an administrator of the estate of one not dead, could not be attacked collaterally; and it is probably true, as Judge REDFIELD remarks, "that that decision is without a precedent, either in English or American jurisprudence." By its judgment in that case, the probate court of course without notice to the living man, declared him dead, and invested another with title to his property. No man in New York or elsewhere in the United States can be deprived of his property, except by due process of law, and it would be strange indeed, if, in such a case as *Roderigas*', the supposed deceased could not against the whole world assert his rights against such a judgment, either directly or collaterally. Probate courts have no jurisdiction conferred upon them over the estates of living men. An order appointing an administrator of the estate of a living man would have the effect, if valid, of taking the property of one man, without his consent, and vesting it in another. Not so of the appointment of one as administrator, not entitled, against another, who has by law the right to administer. The latter has no right of property that would be divested, and the condition of things exists, in regard to that estate, which awakes the jurisdiction of the probate court then, and only then, becoming.

possessed of power and authority to exercise its general jurisdiction in the particular case. *Griffith v. Frazier*, 8 Cranch, 9.

When Higgingbotham died, it became necessary to appoint an administrator of his estate. The probate court had to determine several questions of fact before making the appointment; among them, that Higginbotham was dead, that he resided and had a mansion house in the county where the court was asked to make the appointment, or that, when he died, he had no place of abode or mansion house, that he owned land in that county, and that it was the greater part of his land. Having a general jurisdiction over the subject-matter, and the law requiring the court to pass upon those questions, before granting letters of administration on his estate, it is to be exclusively presumed, in a collateral proceeding, that the court not only did so, but that it correctly passed upon them. To allow their heirs, or any one else, in a collateral proceeding to question the correctness of the judgment of the court, would so imperil the titles conveyed at administrator's sales of lands that no prudent man would bid their value, and estates would be sacrificed. Both public policy and the weight of authority sustain the title which defendant acquired by his purchase at the administrator's sale, and as the instructions which the court gave the jury are in harmony with these views, and those asked by plaintiffs and refused, asserted the contrary doctrine, the judgment is affirmed.

All concur except HOUGH, J., who concurs in the result.

Judgment affirmed.

NOTE BY THE REPORTER. — The case of *Roderigas v. East River Savings Institution* came again before the New York Court of Appeals, and was decided March 18, 1870. We extract the following abstract of the decision from 19 Alb. L.J. 358 :

"In an action by this plaintiff as administratrix of her husband against this defendant, this court held that the payment, by defendant, to Isabella McNeil, who had been appointed administratrix of the estate of her husband, was a bar, although it appeared that at the time of issuing letters of administration the husband was alive. 63 N. Y. 400. In this case the defendant sets up in bar payment of the moneys claimed by the plaintiff to Mrs. McNeil, who presented such letters upon plaintiff's estate. The facts are alike in both cases, except that here it was proved that Mrs. McNeil's petition for letters was never presented to the surrogate, and he never saw her, and never acted upon the petition nor knew of it, nor of the issuing of letters, but the letters were issued by his clerk, who used a blank which had been signed by the surrogate and left with him, and to which he attached the seal. The only proof of death, in this case, was the allegation in the petition, upon 'the best of her knowledge, information and belief.' Held, that the defense was unavailing. At common law letters of administration upon the estate of a living person are void. *Jochumsen v. Suffolk Bank*, 3 Allen, 87; *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9; *Melia v. Simons*, 19 Alb. L. J. 198. When it appears that there was no judicial deter-

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mination of the fact of death, it is difficult to support the grant of letters even to protect innocent persons. Proceedings of courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject-matter. If the court had jurisdiction, its exercise is conclusive, until reversed, however irregular or erroneous. If the surrogate has general jurisdiction of the subject-matter, his decision whether the case calls for its exercise or not is protected against collateral attack. 2 Cow. & Hill's Notes, 987. The surrogate has no jurisdiction to grant administration on estates of living persons. If the person is actually dead, the surrogate has jurisdiction over the subject-matter, and although he acts erroneously, his action cannot be collaterally impeached. Payment to an executor of a forged will is a valid discharge (*Allen v. Dundas*, 3 T. R. 126), because the court had jurisdiction, and its decision that the will was valid was good until reversed. By the former decision of this court the statute was held to extend the jurisdiction to issue letters so that they may be issued not only upon estates of dead persons, but upon estates of persons whom the surrogate should judicially determine to be dead. But here it is not sought to impeach the judgment of the surrogate, but only to show that he never acted, never exercised his judgment. It may be shown that his seal was forged (1 Wms. Ex. 499), and that the blank had been stolen and filled up by a third person. In this case the act of the clerk was at least unauthorized. The surrogate cannot delegate his judicial powers. *Powell v. Tuttle*, 3 Comst. 398; *Keeler v. Frost*, 22 Barb. 400. Either the plaintiff must have been dead, or the surrogate must have judicially so determined. Neither was true in fact there was no exercise of power; and the letters are without any jurisdiction. Again, not only did the surrogate never act, but there was no proof that the plaintiff was dead. This fact would not have rendered the letters void, if the surrogate had really acted, *it seems*. The rule protecting the acts of ministerial officers (*Savacool v. Boughton*, 5 Wend. 170) has no application here. Nor was Mrs. McNeill a *de facto* administratrix, because the surrogate had no color of authority, having no jurisdiction. Administrators are not public officers, and the principle does not apply to them so fully as to public officers. *It seems*, that if the surrogate had held upon evidence that the plaintiff was dead, Mrs. McNeill would have been a *de facto* administratrix. The defendant is not the only innocent party; the plaintiff is also innocent, and her property cannot be taken away without her consent and without authority of law. Order of General Term affirmed and judgment absolute for plaintiff."

STATE V. DRAPER.

(65 Mo. 335.)

Criminal law — evidence — dying declarations.

On a trial for murder, dying declarations are admissible in evidence, when made in view of impending death and after abandonment of all hope of recovery, as to the facts and circumstances constituting the *res gesta* of the homicide, but not as to matters occurring anterior to and not immediately connected with it.*

INDICTMENT for murder. The opinion states the facts.

John O'Day, for appellant.

* See *State v. Patterson* (45 Vt. 308), 12 Am. Rep. 300; *Brown v. Com.* (73 Penn. St. 381) 13 Am. Rep. 740; *Swisher v. Com.* (26 Gratt. 963), 21 Am. Rep. 330.

J. L. Smith, attorney-general, for the State.

NORTON, J. The defendant was indicted for murder in the first degree in the Circuit Court of Jasper county, at its September term, 1876, for the killing of one J. L. Gilbert. On defendant's application the venue of the cause was changed to the Circuit Court of Greene county. In this latter court defendant was put upon his trial, at its May term, 1877, which resulted in his conviction for murder in the first degree. Unsuccessful motions for a new trial and in arrest of judgment having been made, the cause is brought here for review on appeal.

The grounds relied upon for reversal of the judgment are the insufficiency of the indictment, the refusal of the court to receive legal evidence, the reception of illegal evidence, giving improper and refusing proper instructions.

[Omitting the first objection.]

In the progress of the trial witness Carter was permitted to testify as to the dying declaration of Gilbert, against defendant's objections. His evidence was as follows: "Gilbert told him he could not live till morning, that he could not live through the night. Gilbert's voice was very weak. He told me his trouble with Draper originated about a trunk; that Draper and his wife had boarded with him; that some two or three weeks before, they went away, owing him for board, and he left the trunk; that he and Draper had trouble about it then, that they quarrelled, and Draper abused him; that Draper had been to him afterward for the trunk and threatened him; that he refused to let him have it till he paid him, and that he had kept the trunk; that Draper came to his house on Saturday evening before that evening, and called him out doors and outside the gate and told him that by G-d, the d-d son of a bitch, if he did not give up the trunk he would cut his G-d d-d heart out, and skin him, and hang his skin upon the fence to dry; that Draper knocked him down, and inflicted the wounds of which he, Gilbert, believed he was dying."

It is urged as an objection to the evidence that no proper foundation had been laid for its introduction, and that all that portion of the statement made by Gilbert relating to what occurred two or three weeks anterior to the difficulty in which he was stabbed, and all that he said in regard to a quarrel about a trunk, and the threats of Draper previously made, was incompetent, even

though the State had laid a proper foundation for the introduction of the dying declaration of the deceased. We think that a proper and sufficient foundation had been laid for the admission of Gilbert's statement for, previous to his making it, and on the same night it was made, his attending physician testified that he had informed him that he could not get well, and that there was no hope for his recovery, and that Gilbert believed what he told him. Gilbert also told witness Carter, at the time he made the statement, that he could not live till morning. There can be no doubt that the statements were made by Gilbert after he had abandoned all hope of recovery, and in view of death then impending. There was, therefore, no error committed by the court in admitting what Gilbert said at that time, so far as his statement related to and was confined to what was said and done when he was fatally wounded by the defendant.

It seems to be well established law that dying declarations are admissible as to those facts and circumstances constituting the *res gesta* of the homicide, but as to all other matters occurring anterior to the killing, and not immediately connected with it, they are inadmissible. In 1 Greenl. Ev., § 156, it is said, "it is now well settled that dying declarations are admissible as such only in cases of homicide, when the death of the deceased is the subject of the charge, and the circumstances of the death are the subjects of the dying declaration." We have not been able to find any case where such evidence has been given a wider scope than is laid down in the above rule. In the case of *Leiber v. Commonwealth*, 9 Bush, 11, it was held that dying declarations should be restricted to the act of killing, and the circumstances immediately attending it, and forming a part of the *res gesta*. In that case the declaration given in evidence, not only conduced to identify the defendant as the perpetrator of the homicide, and the circumstances immediately attending it, but it also purported to disclose former and distinct transactions, from which the jury might have inferred malice on the part of the defendant. HARDIN, J., in delivering the opinion, says: "The court erred in admitting a part of the dying statements, however competent the evidence may have been, and for that cause, if for no other, the judgment should be reversed." In the case of *Mose (a slave) v. The State*, 35 Ala. 421, the defendant was charged with killing one Martin Oaks, an overseer. On the trial the dying declarations of the deceased were admitted, giving the circumstances attending the homicide, in giv-

ing which deceased stated "that Moses, the defendant, was the only slave on the plantation at enmity with him," and that "Moses was a runaway." In the opinion of the court it is said that the declarations by deceased, that Moses was the only slave on the place at enmity with him, and that Moses was a runaway, do not fall within the principle admitting dying declarations, and the court in admitting them erred. The enmity of the defendant toward deceased, of which previous threats and previous attempts to commit the same act would have been evidence in the case, pointing to the accused as the guilty party, was a fact extrinsic to the circumstances attending the homicide. The judgment was reversed for that error; so, also, in the following cases: *Johnson v. The State*, 17 Ala. 618; *Ben. v. The State*, 37 id. 103.

In the case of *The State v. Shelton*, 2 Jones (N. C.), 360, the deceased, in making his dying declarations, stated that two or three hours before the rencounter, in which he received the blow which caused his death, he had had a difficulty and quarrel with the defendant. This latter declaration was admitted, and for the error in admitting it the judgment was reversed and a new trial awarded, the court holding that dying declarations must be restricted to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ*. In the case of *Nelson v. The State*, 7 Humph. 542, the defendant was indicted and convicted for the murder of one Sellers. On the trial the following dying declarations of deceased were admitted: "That Nelson, the prisoner, had stabbed him; that Nelson had tried to kill him two or three times before." It was held that dying declarations were admissible from the necessity of the case to identify the prisoner and establish the circumstances of the *res gestæ* or direct transaction from which death results. When they relate to former and distinct transactions, they do not come within the principle of necessity. In the case of *Hackett v. The People*, 54 Barb. 370, the dying declarations of deceased were admitted. They contained not only an account of the transaction which terminated in the death of the deceased, but also other facts, and among them the statement "that Hackett, the defendant, had often threatened to kill him." The prisoner's counsel objected to reading the whole statement, admitting that a portion might be read. This objection was overruled. INGRAHAM, J., delivering the opinion of the court, in speaking of that portion of the declaration in which

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deceased stated "that Hackett had often threatened to kill him," observed that "this statement was clearly open to the objection that it did not relate to the transaction from which the death resulted," and adds that its effect on the jury may have been very injurious. "The prisoner was on trial for his life, and the whole question, whether he could be convicted of murder in the first degree, was to be decided by proof of prior ill-will, or prior cause for a premeditated act. It seems to me to be a dangerous precedent to extend the rule which admits dying declarations, made under conviction that the party must die, beyond the immediate transactions which led to his death. The evidence referred to should not have been received and the judgment should be reversed." The limits prescribed to the admissibility of dying declarations in the rule as laid down by Greenleaf, *supra*, and as illustrated in the adjudicated cases above alluded to, in which the rule has been practically applied, necessarily lead to a reversal of the judgment in this case on the ground that only so much of Gilbert's dying declaration as related to the killing and the facts and circumstances attending it, and constituting a part of the *res gestæ*, should have been allowed to go to the jury. The cause in other respects seems to have been well tried. Judgment reversed and cause remanded, in which the other judges concur.

Judgment reversed.

STATE v. O'CONNOR.

(35 Mo. 374.)

Criminal law — absent witness — objections to evidences.

A witness for the prisoner having been subpoenaed on a criminal trial, and not appearing, a statement of his supposed testimony was read by consent. *Held*, that the prisoner thus waived his right to the personal presence of the witness.*

On a criminal trial, it is the duty of the court to exclude improper evidence offered by the State, even if not properly objected to by the prisoner.

INDICTMENT. The opinion states the facts.

J. L. Smith, attorney-general, for the State.

* See *U. S. v. Sacramento* (3 Mont. 289), 25 Am. Rep. 748.

HENRY, J. Defendant asked for an attachment against a witness who had been subpoenaed in his behalf, whereupon the prosecuting attorney proposed to admit as evidence a statement of what would be testified to by West, the witness, to be prepared by defendant's counsel, and thereupon the trial proceeded. The statement of what West would testify to, prepared by defendant's attorney, was by the defendant read in evidence to the jury. There is nothing in the record showing that his application for an attachment was refused, or that defendant was compelled to proceed with the trial without the presence of West; on the contrary, it appears that defendant voluntarily went to trial.

On the trial of the cause, against defendant's objection, the sheriff of the county was by the court permitted to testify that "in December, 1876, when he took charge of the jail, the defendant was in jail under the name of Charles Howard, on a charge of petit larceny." The indictment was found on the 16th of March, 1877, and it may be that the sheriff's testimony related to the very offense for which the defendant was indicted, although he speaks of the charge as petit larceny, and the indictment was for grand larceny; but it is not improbable, nor can we assume the contrary, that the offense for which he was in jail was another and different offense. The evidence was irrelevant and incompetent if it related to any other offense than that for which he was indicted, and, as we cannot say that it did not relate to another and distinct offense, it was error to admit the evidence.

The State contends that as the objection to the evidence was not specific, but general, it cannot be considered by this court. That such is the rule in civil proceeding has been held in many cases in this State; but does it obtain, on the contrary, are there not good reasons why it should not obtain in criminal cases? It is the duty of the court to see that innocent men are not convicted. It has often been held that the court is counsel for the accused; at all events such is the interest of the State that none but the guilty should be confined on criminal charges, that the court should exclude from the jury, all improper evidence against the accused whether the objection be general or special. Even in civil proceedings, when, as in this case, the irrelevancy and incompetency of the evidence is at once apparent, there is no good reason for the application of the rule requiring specific objections to the testimony. The judgment is reversed and the cause remanded. All concur.

Judgment reversed.

JOHNSON V. ST. LOUIS DISPATCH COMPANY.

(65 Mo. 539.)

Libel — corporation.

A publishing corporation is liable to an action for libel. One published of another that he disgraced an office which he had filled; that he had been accused of horse-stealing, had sued his accusers, and the defendants had a verdict. *Held*, that this imputed the crime of grand larceny.

ACTION for libel. The opinion states the facts.

Marshall & Barclay, for appellant.

Lee & Adams and *Henderson & Shields*, for respondent.

HENRY, J. This was a suit commenced in the Circuit Court of St. Louis county to recover damages for an alleged libel, published in the St. Louis Dispatch, a newspaper owned and published in the city of St. Louis. The following was the publication:

"Then there was H. B. Johnson, who disgraced the office now filled by H. Clay Ewing. He was once accused of stealing a stud horse in Lafayette county. He sued the party of accusers, and at the trial, where four Federal office-holders made a part of the jury, a verdict was brought in for the defendant."

There was a demurrer to the petition on the ground that it did not state facts sufficient to constitute a cause of action, and the point relied upon was that the foregoing publication did not charge a criminal offense. The demurrer was sustained at Special Term. On appeal to General Term the judgment was reversed, from which defendant appealed to the Court of Appeals, where the judgment of the General Term was affirmed, and defendant prosecuted an appeal to this court.

That the publication imputed the crime of grand larceny to the defendant is clear. That is the obvious import of the language. In *Button v. Haywood*, 8 Mod. 24, PRATT, C. J., said: "We are to understand words in the same sense as the hearers understand them, but when words stand indifferent and are equally liable to

two distinct interpretations, we ought to construe them *in mitiori sensu*, but we will never make any exposition against the plain, natural import of the words." In *The King v. Watson et al.*, 2 T. R. 199, Mr. Justice BULLER said: "Upon occasions of this sort I have never adopted any other rule than that frequently stated by Lord MANSFIELD to juries, desiring them to read the paper stated to be a libel and say whether in their minds it conveys the sense imputed." The language here was but a publication to the world that plaintiff had been accused of stealing a horse and that he instituted a suit to recover damages for slander and that the jury found him guilty by finding a verdict for defendant. It alleges that plaintiff has disgraced the office he had filled. How? He was accused of stealing a stud horse in Lafayette county, and sued for damages, and, on a trial by jury, their verdict was for the defendant. What is the inference which men of common understanding would draw from the language? Clearly that plaintiff had stolen the horse. Those good citizens who read the publication and believed it to be true would have shunned the plaintiff as one tainted with an infamous crime. If such language be not actionable, a newspaper may libel a man with impunity. In *Delany v. Jones*, 4 Esp. 191, the publication was as follows:

"This is to request that if any printer or other person can ascertain that James Delany, Esq., some years since residing at Cork, late lieutenant in the North Lincoln Militia, was married previous to nine o'clock in the morning of the 10th of August, 1799, they will give notice, etc., and receive the award." Lord ELLENBOROUGH left it to the jury to say whether the advertisement imputed a charge of bigamy to the plaintiff. The stereotyped formulas of slander, "they say," "it is said," "it is generally believed," are about as effectual modes of blasting reputation as distinctly and directly to charge the crime.

That one heard another make the charge which he repeats will not screen him unless, at the time of repeating the words, he affords the plaintiff a cause of action against the original author. Starkie on Slander, 69. For instance, where defendant said, "A woman told me that she heard one say that Meggs, his wife, had poisoned Griffin, her first husband, in a mess of milk," it was held actionable. Putting the charge in an interrogative form will not avail the defendant. The words "Did you hear that J.S. is guilty of treason?" were held actionable, as directly imputing to J.S.

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the crime of treason. We shall not extend these remarks, but adopt the opinion of the Court of Appeals in this case as a very clear and satisfactory statement of the law. The press should not, and under our Constitution cannot, be muzzled. Too much cannot be said in its praise for the good it has accomplished in the world. The utmost latitude consistent with the rights of others should be given it to criticise the conduct both of public men and private citizens, but the peace and good order of society demand that it be kept within the bounds of legitimate criticism. "A newspaper proprietor (says Townshend, in his work on Slander and Libel, page 343), is not privileged as such in the dissemination of news, but is liable for what he publishes in the same manner as any other individual."

We think that there can be no doubt that a publishing corporation is liable in an action for a libel. As remarked by the Court of Appeals in this case, "if the contrary were the law, there would be almost perfect immunity for the newspaper press, most of the large newspapers in the world being the property of corporations." *Gillett v. Mo. Valley R. R. Co.*, 55 Mo. 315; 17 Am. Rep. 653 (overruling *Child v. The Bank of the State of Missouri*), cited by the Court of Appeals, fully sustains the views of that court on this subject. All concurring, the judgment of the Court of Appeals is affirmed and the cause remanded to the Circuit Court of St. Louis, in which it originated.

Judgment affirmed.

STATE V. CULVER.

(65 Mo. 607.)

Highway — abandonment — adverse possession.

Ten years' non-user of a public highway does not amount to an abandonment of the easement, nor does the inclosure of the roadway by the owner of the adjacent land for the like period entitle him to retain possession of it.

INDICTMENT for obstructing a public road. The opinion states the facts.

William Heren, for appellant.

J. L. Smith, attorney-general, for the State.

NORTON, J. Defendant was indicted at the August term, 1874, of the Andrew Circuit Court, for obstructing a public road by building a fence across it so as to obstruct and injure the passage of the same. He was put upon his trial, found guilty, and his fine assessed at \$20. His motion for new trial having been overruled he brings the cause here by appeal. The court gave among others, the following instruction on the part of the State, to which defendant excepted, viz.:

3d. But if you find that the defendant, or those under whom he claims title to his land, fenced in or across the road, and kept and maintained such fence for the period of ten years successively, next before the finding of the indictment, or for any one period of ten years successively at any time before the finding of the indictment, claiming the right to use the land so fenced in fee and independently of said easement or roadway, then the defendant had a right to maintain his fence, or build another on the same ground, and to the same extent, and would not be guilty in so doing, under the law of obstructing the highway or road.

The defendant asked the following declaration, which was refused, to which he excepted: Although the jury may believe from the evidence that the road in question on the lands of the defendant had been located by Fox, Hall and Bedford, as commissioners appointed by an act of the legislature of this State, and that the county court of Andrew county caused the same to be opened as a public road; yet, if the jury further find from the evidence that said road was not kept up as a public road, and that the public ceased to use the same as a public road for ten years next before defendant fenced the same, then the public lost the easement therein, and defendant is not liable for fencing the same.

The action of the court in giving and refusing the above instructions is the error complained of. The record shows that the evidence tended to prove that the road across which defendant erected his fence, had ceased to be used by the public, and had been abandoned for more than ten years as a public road before the erection of defendant's fence; that the road in question had been surveyed, located and established under an act of the legislature approved March 14, 1859, and that defendant, in 1873, built a fence across the same, on his own land, so as to obstruct the travel. When the road was located and established, in pursuance of the act of the legislature authorizing its establishment, the right

of the public to use it as a road became vested. The easement thus acquired over the land upon which it was located could only be defeated either by a discontinuance or vacation of the road by the county court on proper proceedings instituted for that purpose, or by a repeal of the law creating it, or by non-user of the same as a road by the public for such length of time as in legal contemplation would amount to an abandonment of it. It is not pretended that the road had been vacated as the statute provides it might have been whenever it ceased to be of public use, nor is it pretended that the law establishing it had been repealed. If the public have lost their right to the use thereof, it has been by non-user; and this brings us directly to the question, will the non-user of a road, which the public have acquired a right to use as such for ten years, amount in law to such an abandonment of the easement as will justify the owner of land through which it passes, in fencing it up without subjecting himself to prosecution for obstructing a public highway. There can be no question but that defendant, as the owner of the land over which the road passed, retained the fee and all rights of property not inconsistent with the public use of it, and if the use of the highway in question had been abandoned or lost he would be entitled to his original unincumbered dominion over it. Angel on Highways, 366. But has it, in the case before us, been abandoned or lost? Under the views heretofore expressed by this court, we think it has not. In the case of the *State v. Young*, 27 Mo. 259, the defendant was indicted for obstructing a public road, and in disposing of the case Judge SCOTT observed "that when use alone is relied upon as an evidence of a dedication of a right of way to the public, disconnected with any act of the owner showing an intention to dedicate, it must continue the length of time necessary to bar an action to recover the possession of the land. It would seem to follow that the same length of time would be necessary to raise a presumption of an abandonment by the public of a right of way." In support of the proposition thus announced and as the foundation on which it rests the case of *Missouri Institute of the Blind v. How et al.*, 27 Mo. 211, was cited. In the latter case it was held that when there was no evidence of a clear and unequivocal intention to dedicate a highway to public use, there must be an acquiescence by the owner for twenty years in the free use of the highway to authorize the presumption of an intention to dedicate land to public use. The court, after remarking that

there is some contrariety of opinion as to the length of time the owner must acquiesce in the use of his property by the public before it can be said he has made a dedication of it, quotes approvingly from 3 Kent's Com. 451, the following: "If there be no other evidence of a grant or dedication than the presumption arising from the fact of acquiescence on the part of the owner in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required as being the usual and analogous period of limitation." If, as is manifest from the above, in the absence of any thing showing an intention to dedicate, an acquiescence for the period of twenty years by the owner in the use of a way, as a road, would be necessary to raise a presumption of dedication, it would seem to follow that when the public have acquired a right of way in a road, in this or any other manner, non-user of the right for the same period would be necessary to raise a presumption of an abandonment by the public of the right. Under this view the court committed no error in refusing the instruction asked by defendant, and should not have given the instruction on the part of the State above quoted, especially so in view of § 7, 2 Wag. Stat. 917, which declares "that nothing contained in any statute of limitations shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this State." The error committed, however, in this respect, is not reversible error, inasmuch as it was an error in defendant's favor, of which he cannot complain. The evidence in this case seems to establish the fact that the road obstructed by defendant was of but little or no public utility. In such cases the statute makes ample provision for the discontinuance or vacation of such roads, and it is far safer, both for individuals and the public, that the methods prescribed by law for getting rid of useless roads should be pursued, than that an individual should determine the question both for himself and the public, and when he does undertake so to determine, he must take the risks and incur the penalties which any mistake he may make will bring.

The judgment, with the concurrence of the other judges, will be affirmed.

Judgment affirmed.

Hunt v. City of Boonville.

HUNT V. CITY OF BOONVILLE.

(65 Mo. 620.)

Municipal corporation — liability for tort.

A municipal corporation is liable in damages for a lawful and authorized act of its agents done in an unauthorized manner, but not for an unlawful or prohibited act, and is not liable in treble damages.

TRESPASS. The opinion states the facts.

John Cosgrove, for appellant.

McMillan Bros., for respondent.

HOUGH, J. This was an action founded upon the first section of our statute in relation to "Trespases." The petition charged the defendant with digging up and carrying away from the land of the plaintiff certain rock in which the defendant had no right or interest, and asked judgment for double damages. The material portion of the defendant's answer is as follows: "Defendant further answering said petition says that on or about the 6th day of April, 1874, said defendant, by her agent, purchased of the American Bridge Company all the broken rock then being on said above-described piece of ground, and which was then occupied by said American Bridge Company as a stone yard; that afterward, at the request and with the consent of the managing officer of said bridge company, and under and by virtue of the contract previously entered into by and between said bridge company and defendant, the agents and servants of defendant took and carried away a portion of said broken rock, so purchased and obtained from said bridge company as aforesaid; that at the time said rock was purchased and removed as aforesaid, said ground was occupied by and was under the control of said American Bridge Company, except that portion thereof which was and is within the limits of a street of said city of Boonville, known as Water street; that no part of said rock, so taken as aforesaid, was on ground in the possession or under the control of plaintiff, nor had said plaintiff any

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right or interest in said rocks, so taken as aforesaid, or any part thereof." The plaintiff replied, denying the foregoing allegations. The jury returned a verdict for the plaintiff, and found the value of the stone taken to be \$109.20, which sum was trebled by the court, and the defendant has appealed. There is no bill of exceptions in this case, and the only question is whether the pleadings will support the judgment.

The city had authority under its charter to purchase and use stone for the purposes of the corporation, and the trespass in this case did not result, therefore, from the doing of an unauthorized act. Nor is the case like that of *Thomson v. The City of Boonville*, 61 Mo. 283, where an act injurious to the plaintiff, but within the power of the corporation, was performed by certain persons who assumed to act by authority of the city, but who were in fact without any lawful authority authorizing them to do the acts complained of, in which case it was held that the city was not liable. It is apparent in this case that the defendant was engaged in doing what it might lawfully do under its charter, and it does not appear that its servants acted without proper authority; but it is evident from the verdict of the jury that the American Bridge Company had no right to the possession of the plaintiff's land, nor any interest in the stone thereon, and could, therefore, confer none on the defendant, and for that reason the act of defendant in removing the stone amounted to a trespass, otherwise it would have been a legal, valid and binding exercise of corporate authority. It is argued for the defendant, however, that as the city had no authority under its charter to commit a trespass, or to order the commission of a trespass, an order to its servants to do an act which, when performed, constituted a trespass, would not make the city liable, as both the order and the act would be *ultra vires*. This argument fails to distinguish between the doing of an act in its nature unlawful, or prohibited, and the doing of an act in its nature lawful and authorized, at an unauthorized place, or in an unlawful manner. On the defendant's theory, municipal corporations could never be held liable for the negligent or tortious acts of their agents and servants. As they have no authority to do wrong and cannot authorize their officers or servants to do wrong, therefore, it is argued, they can never be held liable for injuries inflicted by them. This is an unwholesome doctrine and is not supported either by reason or authority. *Soulard v. City of St. Louis*, 36 Mo. 546;

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Hickerson v. The City of Mexico, 58 id. 61; *Lee v. Village of Sandy Hill*, 40 N. Y. 447; Dill. on Mun. Corp., § 769.

Whether a municipal corporation can be held liable for treble damages is an open question in this State, and one which admits of much doubt. The statute in relation to trespass gives treble damages against any person who shall dig up, quarry or carry away any stone, ore, etc., in which he has no interest or right, being on land not his own. It is a statutory rule of construction in this State that the words "any person" shall be held to include bodies corporate as well as individuals. It has been held, too, that this statute contemplates voluntary or willful trespass only, and not trespass arising out of mistake or misapprehension. It is punitive in its provisions and is intended to inflict punishment only on the conscious wrong-doer. Private corporations are undoubtedly answerable in exemplary damages for the willful and malicious acts of their agents done in the course of their employment (*Kennedy v. N. Mo. R. R. Co.*, 36 Mo. 351; *Gillett v. Mo. Val. R. R. Co.*, 55 id. 315; 17 Am. Rep. 653); and on the same principle they would be held to be included within the purview of the statute in relation to trespasses above cited. But we are inclined to think that a distinction should be drawn in this particular between private corporations, which are organized and conducted solely for the purpose of private and personal emolument, and public corporations, created by government for political purposes and exercising authority, delegated by the State, for the administration of the local and internal affairs of a city or town of a public character. There is respectable authority to the effect that a municipal corporation cannot, as such, do a criminal act or a willful and malicious wrong and they cannot therefore be made liable for exemplary damages. *City of Chicago v. Langlass*, 52 Ill. 256; 4 Am. Rep. 603; *City of Chicago v. Martin*, 49 Ill. 241; Field on Damages, § 80. "Nor could they, by a parity of reasoning," remarks the author last cited, "become liable in double or treble damages under statutes providing for such damages for willful or malicious trespass. Such acts, if done by its servants or agents, must be without authority, and *ultra vires*." *Hanvey v. City of Rochester*, 35 Barb. 179. Besides the relation which the officers of a municipal corporation sustain toward the citizens thereof for whom they act, is not in all respects identical with that existing between the stockholders of a private corporation and their agents; and there is not the same reason for holding muni-

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pal corporations, engaged in the performance of acts for the public benefit, liable for the willful or malicious acts of its officers, as there is in the case of private corporations. We feel inclined, therefore, to hold that in the case presented the defendant is liable for single damages only, and as the petition is good as a common-law petition notwithstanding it asks relief which cannot be granted, the judgment will be reversed and the cause remanded, with directions to the Circuit Court to enter up judgment on the verdict for single damages.

The other judges concur.

Judgment reversed.

HALL V. STEPHENS.

(65 Mo. 670.)

Devise to husband and wife — sale of husband's interest.

A devise to "A and family" is to A and his wife and children.

In case of a devise to husband and wife, the devisees at common law are joint tenants, the survivor taking the whole estate; and the rule is the same under a statute abolishing joint tenancy.*

In case of a devise to husband and wife with others, the husband and wife take as one person.

In case of a devise to husband and wife, or to them with others, the husband's interest may be sold on execution, subject to the contingent survivorship of the wife.†

ACTION to recover lands. The opinion states the facts.

A. Comingo, and Hall & Givan, for plaintiff in error.

R. O. Boggess, for defendant in error.

SHERWOOD, C. J. "I, Benjamine Stephens, of Boone county, Kentucky, having made a codicil to my former will, I now make this additional one: I give to Hiram Stephens and family, the tracts of land I have lately purchased of Coughenour & Finney; and further, it is my wish, and I appoint and constitute John Brady

*See *Hulett v. Inlow* (57 Ind. 412), 26 Am. Rep. 64 and note, 65.

† See *Hulett v. Inlow*, *supra*, *contra*.

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as my lawful agent over said lands, to be managed for their benefit; and I forbid the sale of said lands without orders from me or my agent;" are the words which gave origin to the present action of ejectment. Since the cause came here on error, the original defendant, Hiram Stephens, has died; that fact has been suggested to plaintiff, and the present defendants, wife and children of the decedent, waiving a *sci. fa.*, which otherwise would have issued, have entered herein, by consent, their voluntary appearance. April 14, 1855, is the date of the codicil. The testator died a few days thereafter. The plaintiff's claim is based on a sale under special execution in 1869, the attachment having been levied January 1st, 1866, on the property in suit as that of the former defendant, and judgment rendered October 4th of the year last aforesaid. The trial court adjudged to recover the undivided one-eighth of the premises in controversy. The plaintiff, however, claims that the recovery should have been for the whole tract, while for the defense it is insisted that judgment should have gone for defendants. As will be hereafter seen, the whole question hinges upon the proper force and effect of the codicil, considered with reference to certain statutory provisions.

1. After no little research, the opinion is entertained that not only did the person named become the recipient of the fee, but that his wife and children became partakers therein also. In *Wylde's case*, 6 Co. 16, it was ruled that a devise to one and his children, the latter living at the date of the will, carried an estate in joint tenancy. 2 Redf. L. W. 14. In *re Terry's will*, 19 Beav. 580, it was held that the word "*family*," is "*children*," unless some circumstance, either in the will or in the situation of the parties, prevent such construction, Sir JOHN ROMILLY, M. R., remarking: "I think it a safe rule to follow the ordinary import of words as used in ordinary conversation." In that case the children were *orphans*, and consequently no question arose as to whether the word "*family*" possessed a sufficiently comprehensive significance to include also parents. In *Barnes v. Patch*, 8 Ves. 604, the words "*remainder of my estate to be equally divided between A's and B's families*," were held to embrace the respective children of those families to the exclusion of the parents, B having pre-deceased the testator. The context of the will, as well as the words themselves, would seem to have warranted the given construction.

In *Exrs. of White v. White*, 30 Vt. 338, where the will gave to

the son of the testator "\$1,500 for the support of himself and family, and for no other purpose" it was held that the word "family" would include the *wife and children* of the testator's son. The *intention* of the testator, it is agreed on all hands, should be the pole star by which courts should steer in construing devises, subject, however, to a certain degree of control, owing to technical rules and the intrinsic force of technical expressions. 4 Kent, 537. In the absence of technical terms, the general rule, as expressed in all cases regarded reliable, undoubtedly is: 1. That words must have their ordinary, popular signification, technical terms excepted, unless, in the context, or subject-matter of the will, something clearly and unequivocally indicates a different use. 2. Where words are capable of a natural, and also a secondary and unusual meaning, preference is to be given to the former method of interpretation. 2 Sto. Eq. Jur., § 1074 b. Proceeding, no doubt, on this *sensible* theory, where the bequest was to "cousins" *simpliciter*, it was held, in the absence of any thing explanatory of the meaning of the testator, that only *first cousins*, there being those answering that description, were intended; the Lord Chancellor (Lord CRANWORTH), after a good deal of examination and discussion at the bar, remarking: "I think that if a testator says no more than he gives to 'cousins,' he must be taken to mean *first* cousins. That will be a practical construction, and one by which the parties entitled will be readily ascertained; it coincides, too, with ordinary experience, for when a person speaks of cousins he generally means first cousins, the children of an uncle or aunt." *Stoddart v. Nelson*, 6 De G. M. & G. 68. Whereupon Mr. Justice STORY remarks: "It seems to us this view, as a general exposition of the difficulty, is extremely satisfactory." 2 Story's Eq. Jur., § 1065, c.

In the English courts, bequests to the family of one have frequently been held void for uncertainty. *Harland v. Trigg*, 1 Brown's Ch. Cas. 142; *Doe v. Joinville*, 3 East, 172; *Robinson v. Waddelow*, 8 Sim. 134. But that line of decision is not so common as formerly, and it is said in English works, 2 Jarm. on Wills, 87 (ed. 1861): "It should seem that a gift to the family, either of the testator himself, or of any other person, will not be held void for uncertainty, unless there be something special creating that uncertainty. The subject-matter and the context of the will are to be taken into the account," and the bequest upheld, if it can be fairly made out what the testator intended by the word "family." 2 Redf.

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L.W. 71, § 5. In *Doe v. Smith*, 5 M. & Selw. 126, where the devise was "the interest of all my land property * * * to my wife * * * after the demise of my wife, to my brother, W. R., during his natural life, * * * and after his decease unto my sister C's family, to go in heirship forever," it was held, in an action of ejectment, that the estate passed in entirety to the eldest son and heir of C. There are other English cases of this sort, where bequests to a family have been held as presumptively intended for the heirs of such family. *Counden v. Clerke*, Hob. 29; *Chapman's Case*, Dyer, 333 b; *Wright v. Atkyns*, 17 Ves. 255; *Griffiths v. Evan*, 5 Beav. 241. This is doubtless attributable in the main to the law of primogeniture and the policy of the law incident to keeping landed estates in a particular line at descent. 2 Redf. L. W. 72. But as we have in this country no law of primogeniture, and as all estates descend to all the children in equal division, it would seem to follow that, were the same line of argument pursued as in England, by parity of reasoning, children would take here in response to the word "family" in like manner as the heir at law does in that country, as the legal exponent of that term. In *Wright v. Atkyns*, 1 Turn. & Russ. 143, Lord ELDON, when speaking of the English rule of construction just noticed, whereby heir at law and "my family" were held convertible terms, says: "The court in its anxiety to find out the meaning of the testator, has found out that *what he has said has the same meaning as if he had said nothing at all.*" The endeavor to reconcile or even to analyze the numerous conflicting decisions of the English courts respecting the meaning of the word under discussion, would be like that of treading the mazes of the Cretan labyrinth. We shall not attempt the task but content ourselves with according to the words "and family" the same import which they bear in ordinary conversation, since there is nothing to indicate their use in a different sense. That Hiram Stephens was intended to take under the devise, no one questions, because he is expressly named; that his children would take is proved by *Wylde's Case* and *Terry's Case*, *supra*. But, as a matter of course, they, under our statute (2 R. S. 1855, § 13, p. 357), would take merely as tenants in common with their father. We are clearly of the opinion that the wife is equally entitled to take, and that the word "family" will readily and naturally bear that construction, which includes her among the devisees. *Executors of White v. White*, *supra*. We have cited the case of *Arthur v. Weston*, 22 Mo.

378, as showing that the entire legal estate passed to Hiram Stephens. That case, however, establishes nothing of that sort, for that was one where a *deed* had been made whereby land was conveyed to "W. W. Phelps & Co.," and held that the deed vested the title in Phelps alone, Mr. Justice LEONARD in conclusion expressly stating: "Nor are we to be understood as declaring that the same rule would be applicable to a *devise* of real property, but the point decided is confined to the very case before us — a legal conveyance *inter vivos* of real property." And no doubt, that eminent lawyer, when using those guarded expressions, bore in mind the greater liberality of construction, which is applied to wills; they being supposed to be drawn *inops consilli*. Having thus ascertained that the wife, as well as the husband, is a partaker with him in that which the will confers, inquiry must be had respecting the quantity and nature of the interest of which the husband and wife became the recipient at the testator's death, and whether evidence was receivable to show who composed the family. These points will be considered in their order.

II. Husband and wife at common law, to whom a grant or devise was made, took *per tout et non per my*, and the survivor took the whole. 1 Bright's Husb. and Wife, 25, and cases cited. This peculiar result arose from the legal identity of husband and wife, both being regarded as one person. Our statute has wrought no change in this particular, as has been expressly and repeatedly adjudged. *Gibson v. Zimmerman*, 12 Mo. 385; *Garner v. Jones*, 52 id. 68; *Shroyer v. Nickell*, 55 id. 264. Those adjudications were based on the following section: "Every interest in real estate granted or devised to two or more persons, other than to executors or trustees as such, shall be a tenancy in common, unless expressly declared in such grant or devise to be in joint tenancy." 2 R. S. 1855, § 13, p. 357. This section has been in existence since 1835, and must govern this case. In 1865 the section received a modification, by striking out the words "as such" immediately after "trustees," and inserting "or to husband and wife." Gen. Stat. 1865, p. 443, § 12. Thus conforming legislative enactment to previously received judicial construction announced in *Gibson v. Zimmerman*, *supra*.

And when husband and wife are co-grantees or co-devisees with a third person, the last named takes one moiety and the husband and wife the other. 1 Bright's H. & W. 27; Litt., § 291. If there are two other persons co-grantees or co-devisees, besides husband

and wife, then the subject-matter of the grant or devise is vested one-third in the husband and wife, and the remaining two-thirds in the other persons in equal proportions, and so on, in accordance with the number of persons entitled; the husband and wife always representing a single unit or integer of legal identity. In the case before us, as there were six children at the death of the testator, the husband and wife became together seized of one-seventh of the land devised. *Barber v. Harris*, 15 Wend. 615. And in this connection the inquiry becomes pertinent whether evidence regarding the members of the family, and of whom composed, was properly admitted; which point is next for consideration.

III. Although it is well settled that extraneous evidence is not received to vary, explain, contradict or control the terms of a will (1 Redf. L. W. 597, § 41), yet it is equally well settled that evidence of surrounding circumstances, of the subject-matter of the devise, and of the persons to be benefited thereby, is receivable, in order to place the court, so far as may be, in the situation of the testator, and, looking from his standpoint, to determine both the subject and objects of his bounty. Wigr. on W. 101, 109; Redf. L. W. 488, 587, 597 and 598, 600, 621, 623; *D. and F. Miss. Soc. Appl.*, 30 Penn. St. 425; *Blundell v. Gladstone*, 11 Sim. 467; *Ex parte Hornby*, 2 Bradf. Sur. 420. Sir JAMES WIGRAM, in his learned work above cited, in his fifth proposition, p. 142, says, in reference to extrinsic evidence: "For the purpose of determining the object of a testator's bounty, or the subject of disposition, a court may inquire into every *material* fact relating to the person who claims under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs for the purpose of enabling the court to *identify* the person or thing intended by the testator. The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of the testator's words." To the same effect see 1 Greenl. Ev. (13th ed.), § 287, note 1. We, therefore, regard the ruling of the court correct in admitting such evidence, and supported alike by reason and authority; for to hold that such evidence is not admissible, would be equivalent to saying that the words "and family" are void for uncertainty. Such evidence must of necessity be received to identify those who are re-

ferred to in the will. *Weston v. Redd*, 12 Gratt. 196; *Introduct.* on W. p. 12.

IV. If, as already seen, the husband and wife became seized in entirety of the undivided one-seventh of the devised premises, the plaintiff is clearly entitled to a corresponding recovery of possession, if the husband had at the time of the sale any interest therein susceptible to execution. The great current of authority affirms such susceptibility; going only so far as this, however, that if the wife survive her husband, she, as such survivor, will be entitled to the whole. This theory, that the husband is possessed of a vendible interest, has for its basis that the husband, *jure mariti* is entitled to the possession and usufruct of the wife's real estate during marriage, which right suffers no diminution or abatement by reason of his own interest in land whereof both his wife and himself are jointly seized. *Ames v. Norman*, 4 Sneed, 683; *French v. Mohan*, 56 Penn. St. 286; *Bennett v. Child*, 19 Wis. 362; *Freeman's Co-Ten. and Part.*, §§ 73, 74; 1 Wash. R. P. (4th ed.) 672; *Bishop's L. M. W.* 622; *Stoebler v. Knerr*, 5 Watts, 181.

There is also abundant authority enunciative of the kindred doctrine that a husband thus jointly seized with his wife has absolute control of the property during the life of the wife and may make a valid lease during his life in his own name (*Torrey v. Torrey*, 14 N. Y. 430); make like lease whereon ejectment may be brought (*Jackson v. McConnell*, 19 Wend. 175); maintain ejectment in his own name (*Topping v. Sadler*, 5 Jones [N. C.], 357); bring in his own name trespass *qu. cl. freg.* (*Fairchild v. Chastelleux*, 1 Penn. St. 176); determine tenancy in his own name, and concurrence of wife not necessary (*Pollok v. Kelley*, 6 Irish C. L. [N. S.] 367); has a sort of interest of his own, distinct from his wife, which interest he may convey. *Bishop's L. M. W.*, § 621. A different result from that here announced, respecting the sale under execution of the husband's interest, has been reached in Indiana. *Chandler v. Cheney*, 37 Ind. 408. But the court there, while correctly stating that at common law the husband had no tenancy by the courtesy in lands held in entirety, altogether ignores the important fact before adverted to, of his possessing, during coverture, the absolute control over all property of the wife, and being entitled to the possession and usufruct of her land. Certainly no less right could attach by reason of his also occupying an attitude whereby if he proves survivor he may acquire the whole estate.

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And an examination of the authorities cited in that case will scarcely support the position there assumed. *Rogers v. Grider*, 1 Dana, 242, surely does not, for it only adverts to the general doctrine, and holds that where an execution sale had occurred the wife's right of survivorship would not be defeated. The case of *Roanes v. Archer*, 4 Leigh, 550, but lightly considers the point of the vendibility of the husband's interest, and is based on *Scott v. Gibbon*, 5 Munt. 86, to which it refers, where it was expressly held that the husband, in consequence of an *antenuptial marriage settlement*, had no vendible interest whatever. Rorer on Judicial Sales, § 549, apparently gives support to the Indiana case, saying: "So no separate proceeding against one of them, during their joint lives, will, by sale, affect the title to the property as against the other one as survivor, or as against the two during their joint lives." The only authorities cited in the margin to uphold the text are *McCurdy v. Canning*, 64 Penn. St. 39, which is controlled by special statutory provision, and *French v. Mehan*, *supra*, which expressly recognizes the doctrine that the husband's interest is vendible, citing *Stoebler v. Knerr*, 5 Watts, 181, and that the husband, having the entire control of the estate during his life, may convey or mortgage it during that period. And even Mr. Rorer very guardedly says, in a note to the section referred to: "We may add here, that if a sale as against the husband on execution against him can affect the possession during the joint lives of the husband and wife, it can only be so upon the principle that *during that time her possession is merged in his*." Search has been in vain for any common-law authority giving color to the assertion that the husband cannot, by his own conveyance *alone*, pass a title which shall be good at least during his life (subject to defeat, as a matter of course, by the wife's survivorship). On the contrary, in the old books, Rolle's Abr., tit. Recovery, Pl. 4, and Piggot's Treat. of Com. Recov. 72, cited in *Robinson v. Comyns*, Cas. Temp. Talbot, 164, "It is laid down that a husband seized jointly with his wife, whether by moieties or entireties, or seized only in right of his wife, may create an estate or *freehold during the coverture*, and thereby make a good tenant to the præcipe." Mr. Preston says, "This species of tenancy owes its qualities to the *unity* of the persons of the husband and wife. Each, in the intendment of law, has the entirety; * * * each has a power of alienation over the entirety, subject only to the right of the other." To the same

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effect are, 1 Bright on Husb. and W. 26; 1 Prest. Convey. 54; 1 Co. Litt. 187a, 187b; 2 Greenl. Cruise, 373; 1 Atk. 473; 2 Prest. Abstr. 43.

Mr. Justice COWEN, in *Jackson v. McConnell*, 19 Wend. 175, after commenting on a number of authorities, among them *Doe v. H.*, 8 Cow. 283, says that the husband alone cannot *alien*; "the meaning is he cannot alien the *entire* estate." In Bishop's Law of Mar. Wom., vol. 1, § 622, it is stated not only that the husband's interest in the land held by the entirety is vendible under execution, but that such sale takes from him all his estate, whatever it may be in the land. And in *Ames v. Norman*, *supra*, it is distinctly held that the purchaser at execution sale takes the entire estate if the husband survives the wife. As the facts presented by the record before us do not require it, it is unnecessary to give expression of opinion going to the full extent of the authorities just cited. We only hold, in the case at bar, that the husband's interest during his life at least passed by reason of the execution sale, and that his wife surviving took that whereof they had been jointly seized.

[Omitting statutory considerations.]

Inasmuch as the plaintiff was clearly entitled to a recovery of one-seventh of the estate devised, the judgment which accorded to him a lesser recovery must be reversed. The matter, however, in consequence of the death of the husband during the pendency of the cause in this court, is at present of no great practical importance. With directions that the lower court do take suitable action conformably to this opinion, and also regarding the rents and profits down to the period of the husband's decease, the judgment will be reversed and the cause remanded. All concur.

Judgment reversed.

 STATE SAVINGS BANK V. KIRCHEVAL.

(65 Mo. 632.)

Fixtures.

In determining whether an improvement to real estate is a fixture, the intention of the party placing it and the manner of placing it, are not conclusive but much depends on its object and use.

As between mortgagor and mortgagee, a frame building, resting on wooden

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blocks laid on the ground, designed as an office in connection with a mill, but detached therefrom, and intended by the mortgagor to be removed, is a fixture, although erected after the execution of the mortgage,* and its removal will be restrained by injunction.

SUIT to enjoin the removal of a frame building, erected by defendant Allen on defendant Kircheval's land, mortgaged to plaintiff, and sold by Kircheval to Allen in payment of its construction, and about to be removed by Allen. The land was occupied and used for a mill, built of brick. The building in question was about three feet from the mill and only connected with it by a wooden walk between the outer doors of the buildings, was intended for an office, and was built on blocks laid on the ground. It was constructed after the execution of the mortgage, and was intended to be removed. An injunction was decreed.

E. O. Hill, for appellants.

B. Pike and *H. K. White*, for respondent.

HENRY, J. The questions for consideration here are:

1st. Was the building, which it is alleged the defendants were about to remove, personal property?

2d. If not, would an action for damages have afforded an adequate remedy?

It must be admitted that the law in regard to fixtures is in a somewhat chaotic state. It is frequently difficult to determine, upon principle, whether an article of property is a fixture or not. There is a most embarrassing conflict in the adjudged cases. On grounds of public policy, to encourage trade, manufactures and agriculture, many things are regarded as chattels in controversies between landlords and tenants, which would unquestionably be held as fixtures, as between vendor and vendee; and the same rule prevails between mortgagor and mortgagee, as between grantor and grantee. In determining whether a building is part of, and passes with the land, a good deal depends upon the object of its erection, the use for which it was designed. The intention of the party making the improvement, ultimately to remove it from the premises, will not, by any means, be a controlling fact. One may erect

* See *Hutchins v. Masterson* (46 Tex. 551), 26 Am. Rep. 286; *McConnell v. Blood* (128 Mass. 47), 25 Am. Rep. 12; *Arnold v. Crowder* (81 Ill. 56), 25 Am. Rep. 200.

a brick or a stone house, with an intention, after brief occupancy, to tear it down and build another on the same spot, but that intention would not make the building a chattel. "The destination which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could neither be established nor taken away by the simple declaration of the proprietor, whether oral or written." *Snedeker v. Warring*, 2 Kernan, 178. In *Goff v. OConner*, 16 Ill. 422, the court said: "Houses in common intendment of the law are not fixtures, but part of the land. * * This does not depend, in the case of houses, so much upon the particular mode of attaching, or fixing and connecting them with the land, upon which they stand or rest, as upon the uses and purposes for which they were erected and designed." In *Cole v. Stewart*, 11 Cush. 182, the building was intended by the owner to be temporary, and was built with a view to ultimate removal. In a contest between the mortgagee, whose mortgage was executed subsequent to the erection of the house, and a purchaser of the building from the mortgagor, it was held to be a fixture. In the light of these cases, and many others which we have examined, we do not regard the fact, that the building in question was erected as a temporary building, and with an intention of ultimate removal, at all decisive as to whether it became a part of the realty or not.

The manner in which a building is placed upon land whether upon wooden posts, or a rock, or brick foundation, does not determine its character. As was said by PARKER, J., in *Snedeker v. Warring*, above cited: "A thing may be as firmly fixed to the land by gravitation as by clamps or cement. Its character may depend upon the object of its erection." In *Teaff v. Hewitt*, 1 Ohio St. 511, it was held that: "The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention to be inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose and use of which the annexation has been made," is a controlling circumstance in determining whether the structure is to be regarded as a fixture or not. In the case of *Benjamin F. Butler, Adm., v. Page*, 7 Metc. 42, SHAW, C. J., delivering the opinion of the court, said. "All buildings erected and fixtures placed on mortgaged premises by the mortgagor must be regarded as permanently

annexed to the freehold. They go to enhance the value of the estate, and will therefore inure to the benefit of the mortgagee so far as they increase his security for his debt, and to the same extent they enhance the value of the equity of redemption, and thereby inure to the benefit of the mortgagor." In controversies between mortgagor and mortgagee the rule is more favorable to the mortgagee in relation to fixtures than that which is applied as between landlord and tenant, and applying the principles announced in the cases which we have cited, which we believe to be sound and salutary, we must hold that the building in question was a part of the realty, and that neither the mortgagor nor the purchaser from him has a right to remove it. It becomes a part of the plaintiff's security for its debt.

The remaining question is, did the facts alleged in the petition warrant the court in restraining the parties by injunction from removing the building. It is not essential that the injury threatened shall be irreparable, to warrant a resort to the remedy by injunction. Our statute provides, sec. 24, p. 1032, Wag. Stat., that "the remedy by writ of injunction shall exist in all cases, when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages." Would an action for damages here have afforded an adequate remedy, is the question, and not whether the threatened injury would have been irreparable. The building was erected to be used in common with, and as an office for, the mill. It was erected to supply the place of an office formerly used, which had been appropriated to another purpose. Its immediate and constant use was of importance to the milling business. The value of the building which a jury might have given as damages would not have been a sufficient compensation to the owner for its removal. The defendant Allen may have been solvent, amply able to respond in damages for his trespass, but it does not therefore follow that he could not be restrained from severing from the land a house which belonged, not to him, but to the owner of the land. If a man of large fortune, so wealthy as to place beyond a doubt his ability to pay any damages which might be assessed to me for his trespass, should determine and threaten to tear down my dwelling over my head, will it be said that a court of equity would be powerless to restrain him from executing his threats, and that I would have no

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remedy but to suffer the wrong and sue for damages? There are inconveniences and perplexities to which one may be subjected by a trespass such as we are considering, for which a jury could not, under the rules of law, fully compensate him, and we think the provision of our statute broad enough, however the law may have been before its enactment, to authorize a resort to injunction proceedings in such cases. The judgment of the Circuit Court is affirmed. All concur.

Judgment affirmed.

 DUKE V. HARPER.

(66 Mo. 51.)

Champerty.

Although champertous contracts are void, yet as it is an essential element of such a contract that the attorney is to contribute to the expenses of the litigation, an agreement merely that the attorney is to receive as compensation for his services, a portion of the subject-matter of the litigation, is not champertous. (*See note, p. 319.*)

ACTION of damages for breach of contract for the conveyance by defendant to plaintiff of a quarter of certain property, as compensation for services as attorney in recovering said property in legal proceedings for defendant. Demurrer, on the ground that the agreement was champertous, was sustained by the trial court, but this judgment was reversed on appeal to the St. Louis Court of Appeals, and defendant appealed.

Martin & Lackland, for appellant.

Davis, Thourghman & Warren, for respondents.

HENRY, J. "Champerty," says Hawkins, "is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it." Sir EDWARD COKE's definition is similar, and he says it was an offense at common law before any statutes were passed on the subject, and cites Bracton and Fleta to support his position. Blackstone defines champerty to be "a bargain with the plaintiff or defendant *cam-*

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pun partire, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." Bouvier's definition of the offense is the same as Blackstone's. Cooley's Blackstone, fourth book, 435; Bouvier's Dictionary, vol. 1, p. 259. In a note to Cooley's Blackstone, Judge COOLEY observes that "the tendency of late has been to confine these offenses (maintenance and champerty) within bounds somewhat narrower than those indicated by the older authorities," page 135. In *Lathrop v. Amherst Bank*, 9 Metc. 490, the court said: "No doubt is entertained that the earlier doctrine as to maintenance has been very essentially modified." At the date of the American revolution the English common law was in this country learned from Blackstone. He was the standard authority, and in his Commentaries, more than in the works of any other English author, did the lawyers of that generation study the English common law, and even now in the United States it is a text-book in all the law schools, and no effort to supplant it has ever been successful. Kent's Commentaries, notwithstanding the high estimate placed upon the work by the profession, is not regarded as a substitute for Blackstone, and an American lawyer who has not studied Blackstone's Commentaries would be an exception among thousands which the profession numbers.

The common-law doctrine of champerty, as explained by Blackstone, became the law of the States of this Union which adopted the common law, except in a few of the States whose courts have held that the common law of champerty was not applicable to their circumstances. In *Richardson v. Rowland*, 40 Conn. 565, the learned judge who delivered the opinion of the court observes that "among the States which discard the rule are Vermont, Delaware, Tennessee and Iowa." We may add to this list California and Texas. But even in Vermont, in *Danforth v. Streeter*, 28 Vt. 490, REDFIELD, J., delivering the opinion of the court, said: "There are probably other things coming more nearly to the idea of the common law definition of maintenance or champerty, such as carrying on suits for a share of the avails and thereby increasing litigation, and some others perhaps which the law will still regard as champertous and not countenance. But the present case does not seem to us of that character." Again he said: "The offense certainly does not exist in form in this State unless the common-law offense has been adopted as part of the law of this

State, which I am reluctant to believe was the purpose of the legislature unless with some qualifications." Unless the meaning of this language of the court be that the common-law offense of champerty has not been adopted as a part of the Criminal Code of Vermont and is not punishable as a crime there, but that a contract is nevertheless void, which, by the common law, is champertous, the above extracts are irreconcilable. We hold, however, that case to be an authority in support of the views we entertain of the case we are considering.

In the States of Kentucky, Alabama, Illinois, Indiana, Wisconsin, Ohio, Michigan, Massachusetts and Rhode Island, the common-law offense of champerty is recognized whether to the extent of being punishable as a crime or only as invalidating contracts, which at common law were champertous, it is unnecessary in this case to inquire. Judge STORY, in his Commentaries, says: "It is deemed an offense against public justice and punishable accordingly, both at the common law and by statute, as tending to keep alive strife and contention and to pervert the remedial process of the law into an engine of oppression." Story's Equity, § 1048. In *Martin v. Clarke et al.*, 8 R. I. 403, the court said: "Whether we look therefore at the ancient common law, to the English statutes upon the subject, or to our own legislation, the conclusion must be the same, that champerty is an offense against the law. Being such it must avoid every contract." In New York they have champerty statutes which the courts of that State have evidently construed as covering the whole ground and repealing the common law. In *Thompson v. Reynolds*, recently decided by the Supreme Court of Illinois, but not yet reported, the following language was held by the court, WALKER, C. J., delivering the opinion, a manuscript copy of which is before me: "It thus appears that champerty was an offense at the common law, and our general assembly having adopted the common law of England as the rule of decision, so far as applicable to our condition, until modified or repealed, this must be regarded in this State as affecting all such contracts, and as being opposed to sound public policy." The agreement sought to be enforced there was one by which it was stipulated that plaintiff should receive for his services a portion of what should be received in the suit, and bear the expense of its prosecution. It was held void, as a champertous contract.

We will not undertake to cite all the cases, but the weight of

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authority sustains the position that an act of the legislature of a State, adopting the common law, with only the usual qualifications contained in such act, adopts the common law in regard to champerty. And generally the courts which have so determined have also declared that the law of champerty, as explained by Blackstone, and not as defined by Coke and the older authorities, is that which obtains. Blackstone, fourth book, 135; *Lathrop v. Amherst Bank*, 9 Metc. 490; *Allard v. Lamirande*, 29 Wis. 502; *Martin v. Clarke et al.*, 8 R. I. 397; *Bayard v. McLane*, 3 Harr. 212; *Benedict v. Stuart*, 23 Barb. 421; *Ogden v. Des Arts*, 4 Duer, 283. In *Bayard v. McLane*, *supra*, the court said, "this important ingredient of paying or contributing to the expenses of the suit seems ever since to have been regarded as essential to constitute the offense of champerty, being introduced into all the elementary works of authority as a part of the definition." Counsel for appellants misconceive the case of *Allard v. Lamirande*, 29 Wis. 502. It was an action by plaintiff to recover from defendant a tract of land. The plaintiff had judgment and defendant appealed. He claimed "that a champertous agreement between plaintiff and plaintiff's attorney relating to the compensation of the latter was proved on the trial, and that the court erred in denying the motion of the defendant to dismiss the action because of such agreement." The court held that the law against champerty obtained in that State. LYON, J., said: "In all the agreements which have been held by this court to be champertous, there were express covenants or stipulations that the champerters should pay the expenses of the litigation." Again: "Upon the whole we see no good reason founded on principles, either of justice, public policy, or professional propriety, for holding that the agreement between the plaintiff and his attorney is champertous, although upon the authorities it would be otherwise had the attorney agreed to pay the expense of the litigation."

In the case of *Crow v. Harmon*, 25 Mo. 417, the following was the agreement sued on: "I promise to pay G. W. Crow one hundred dollars if the M. T. Lewis county-road is not opened and kept open along the creek where it is now located, or if said Crow should make null the present proceedings of the court and commissioners, as already had and done by them. I also agree that if said road is opened and kept open that said Crow shall have all the damages that may ever be assessed me for the same." Messrs. Foster, Vories

and Loan, for defendant, contended that the agreement was champertous and void. Messrs. Hall and Gardenhire insisted that it was not champertous because there was no stipulation that Crow was to "supply money to carry on any suit on condition of sharing in any land or other property gained by it." The lawyers on both sides were of high standing at the bar, and seem to have assumed that the common law of champerty was the law in this State. SCOTT, J., delivered the opinion of the court and observed: "As to the objection that the contract was champertous, it may be answered that there is nothing on the face of it showing that it is obnoxious to such an imputation, nor was there any evidence in support of it." This was all that was said in the opinion on that subject. We think the clear inference from the language of the court is that it regarded the common law of champerty as in force in this State. That case is also an authority for the position that to render a contract champertous, the party stipulating for a portion of what may be recovered as a compensation for his services must likewise agree to bear all or a portion of the expense of the litigation. The contract was clearly champertous according to the older English authors, for it was stipulated that, if the road was established, Crow was to have all the damages that might be assessed to Harmon on account of the condemnation of his land for that purpose. This is the only case we have been able to find in the Missouri Reports, and we are satisfied that it is the only one that has ever been before this court, until now, involving this question.

Section 1, page 886, 2d volume Wagner's Statutes, is as follows: "The common law of England and all statutes and acts of Parliament made prior to the fourth year of the reign of James I, and which are of a general nature, not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this State, any law, custom or usage to the contrary notwithstanding." Although we adopted the common law without the qualification that it be applicable to our condition, the courts would be at liberty to declare that any portion of the common law inapplicable to our condition and circumstances, does not obtain here. But there is nothing in the law of champerty as expounded by Blackstone and Bouvier, and the American courts in the adjudicated cases which we have cited, that is not applicable

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to our condition. The race of intermeddlers and busy-bodies is not extinct. It was never confined to Great Britain, and the little band of refugees who landed from the Mayflower on the coast of New England were not entirely free from the vice of intermeddling in the concerns of other people. It is as prevalent a vice in the United States as it ever was in England, and we do not see but that a law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary, even in Missouri. A man having a doubtful claim to property in the possession of another, who would hesitate to incur the expense of testing its validity, will readily agree that one who will bear the burden of the contest, and take part of the recovery for his pay, may institute the suit in his name. Such contracts are champertous and should be so held on principle everywhere.

The contract under consideration, however, is not champertous, because while the attorneys agreed to receive as a compensation for their services, as such, a portion of the property in controversy, they did not bind themselves to pay any portion of the expenses of the litigation.

We do not agree with the Court of Appeals that "the whole doctrine of champerty and maintenance is a relic of a state of things long since passed away," and we affirm its judgment, not because champertous contracts are not void in this State, but because the contract in question is not champertous. All concur.

Affirmed.

NOTE BY THE REPORTER.—The Supreme Court of Iowa, in *Adye v. Hanna*, 47 Iowa, 264, held that an agreement by an attorney to pay any judgment that should be finally rendered against his client in a certain suit, in consideration that the latter would appeal the case and pay the attorney a fee for conducting the same, was void as against public policy, and could not be enforced by either attorney or client. The court say: "In another respect it is in conflict with the policy of the law, which promotes and upholds purity and justice in the administration of remedies in the courts. The attorneys bound by the contract become liable in the place of their client. They have the most powerful motive to pervert justice and corrupt its source, in order to escape the liability they have assumed. They are officers of the court, and as such ought to be trusted by judges as well as clients. Their duty does not require them to pervert the law or deceive those clothed with the power to administer it. On the contrary, it forbids them, under the heaviest penalties, to do any act that may have such an effect. They are to aid the courts in the administration of justice. Their duty requires them to endeavor to secure to their clients his rights under the law and nothing more. For such services the law will secure them compensation from their clients. It requires neither arguments nor explanations to show what great temptations would be placed before the attorney to violate his duty, and to endeavor to corrupt the fountain of justice were he to take the place of his client, and become responsible for all liabilities incident to a decision adverse to time. The law will not permit members of the legal profession to be assailed with temptations so dangerous in their character. They have the most grave duties to perform in the administration of justice; they stand before

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the world, as a class, distinguished for honor, integrity and public virtue. The law will be careful to recognize no rules or principles, which in their application to the practice of courts or business of attorneys, may tend to corrupt the legal profession, or rob it of the high character it has always maintained."

In *Schomp v. Shenck*, 40 N. J. Law, 195, an attorney, not a counsellor, undertook to set aside a will for a client, upon the agreement that he was to have five per cent of the recovery in case of success, and such allowance as the court might make him out of the estate, in case of defeat. The Supreme Court, in an elaborate opinion, sustain the agreement, declaring that the law of champerty and maintenance does not prevail in that State. The court make a distinction between attorneys and counsellors, saying: "I do not find anywhere that it was the common-law rule, that irrespective of the law of maintenance, an attorney at law could not stipulate for his compensation. Such contracts were undoubtedly regarded with great jealousy by the courts, and were very generally discountenanced by the legal profession, and were seldom enforced, and were not unfrequently set aside by courts of equity. But the idea that attorneys were subject to the same disability that an advocate was, in regard to contracting with their clients for their remuneration, has no foundation in legal history or adjudged cases."

In the leading case of *Kenedy v. Brown*, 13 C. B. (N. S.) 677, Chief Justice ERLE confined his proposition of incapacity to make contracts for compensation, to advocates. While the New Jersey court admit that the weight of American doctrine is against such incapacity yet they say they cannot concur in that view, as the only foundation for the rule "was its supposed efficacy in sustaining the honorable standing of the advocate." This of course is *obiter*.

In the same case, on the point of champerty it was argued "that a stipulation to bear the expenses of the litigation is an essential ingredient in the offense of champerty." But the court say, "the authorities do not sustain, but on the contrary, they overthrow this contention. The consent of the attorney to give his service is in effect a stipulation to contribute largely to the ordinary expense of a suit, and consequently it would seem to follow, reasoning upon general principles, that such an arrangement must be deemed illegal wherever the statutes in question are in force." But they conclude: "It is obvious that the system that had grown up under these laws relating to maintenance was not altogether in harmony with the habits, needs and business of modern life, and this consideration has helped me to the conclusion to which I have arrived, that the doctrine of maintenance has never had a foothold in the jurisprudence of this State."

Bouvier defines champerty: "A bargain with a plaintiff or defendant, *campum partem*, to divide the land or other matter sued for between them, if they prevail at law, the champertor undertaking to carry on the suit at his own expense. This offense differs from maintenance in this, that in the latter the person assisting the suitor receives no benefit, while in the former he receives one-half or other portion of the thing sued for. On the other hand, Coke in 2 Inst. 564, says: "An apprentice or attorney cannot contract to have any part of the thing in demand, after the recovery;" and in *Box v. Barnaby*, Hob. 117, it is said: "I hold that if an attorney follows a cause to be paid in gross, that is champerty."

There seems to be a distinction between a layman and a lawyer as champertor. To constitute the offense on the part of the layman, he must contribute in money to the expenses of the action; but the lawyer is held to contribute by his services. See *Coughlin v. N. Y. Cent. & H. R. R. Co.*, ante, p. 75.

In *Thurston v. Percival*, 1 Pick. 415, an agreement by which an attorney and counsellor was to receive a percentage of the money, was held void. The suit was pending in New York, and the attorney did not act as advocate, being prohibited from doing so by the laws of that State. It did not appear that he contributed any money, and that point was not specially raised. The court spoke with disfavor of the state of the law, and allowed a recovery *quantum meruit*.

In *Key v. Vattler*, 1 Ch. 183, an attorney furnished the means to contest the suit, and was to have a portion of the recovery. The agreement was held void. The court emphasizes the statement that the defendant "was to be at no expense," and in the definition of champerty make the payment of the expenses an ingredient.

Brown v. Beauchamp, 5 Monr. 417, was not a case of an attorney, and in defining the offense of champerty, the furnishing of money is omitted, the court saying, "the unlawful intermeddling or upholding constitutes the offense."

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Rust v. Loeue, 4 Litt. 417, was a case of an attorney, and the court define champerty, "an agreement to aid in a suit, and then divide the thing recovered."

Ardon v. Patterson, 5 Johns. Ch. 44, was the case of the purchase by an attorney of a claim, and the prosecution of it at his own risk and expense, and for his own benefit. This was held champerty under the New York statute, which then defined it, a suing at one's own costs, to have part of the thing in controversy on demand.

Holloway v. Lowe, 7 Port (Ala.) was the case of an attorney agreeing for a trifling sum and a fourth of the recovery to prosecute the suit. Held, champerty.

Moses v. Bagley, 54 Ga. 383, holds the agreement to pay costs essential to the offense of champerty.

See *Martin v. Clarke* (3 R. I. 389), 5 Am. Rep. 536.

SINGLETON V. ST. LOUIS INSURANCE CO.

(66 Mo. 63.)

Life insurance — interest — evidence — statements of insured.

A policy of insurance procured by an uncle in his own favor upon the life of his nephew, in which he has no pecuniary interest, is void.

The burden of showing insurable interest is upon the claimant.

In an action on a policy in favor of one on the life of another, statements of the insured as to his feelings at the time, when not too long before the application to throw light upon the subject, are admissible in evidence; but such statements as to previous ill health are inadmissible.

Parol evidence is admissible to explain the sense of the expression: "spitting of blood," in an application for life insurance. (See note, p. 327.)

ACTION on a policy of insurance in favor of plaintiff on the life of John T. Anderson, issued Dec. 12, 1872. The application contained the following questions and answers: "12. Has the party had, since childhood, consumption, bronchitis, spitting of blood, * * and if so, which? Answer, No. 15. Has the party now, or has he had a habitual cough, or any pulmonary disease, or is any suspected? Answer, No. 18. Is the party now in good health, and free from any symptoms of disease? Answer, Yes." It was one of the conditions of the policy that unless all the answers in the application were true, the policy should be void. Dr. Adams, a witness for defendant, was asked what statements Anderson made to him at the time he examined him in the spring of 1872, as to his condition and symptoms prior to that time, and as to his having in the past had spitting of blood or a habitual cough; but the court ruled that the witness could detail the statements made to him by Anderson as to his condition and symptoms at the time he

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saw and examined him, but not as to his condition at any previous time. The same ruling was made in regard to another witness, not a physician. Physicians were permitted to testify that "spitting of blood" is a medical term, meaning spitting of blood from the lungs exclusively. The defendant asked the following instructions, which were refused: 10th. To entitle the plaintiff to recover in this action he must show some insurable interest in the life of Anderson, and in the absence of any evidence showing, or tending to show, such insurable interest, the jury must find for defendants. 13th. If the jury believe from the evidence that Anderson had at the date of the application, or had had at any time previous thereto since childhood, spitting of blood, from whatever source it originated, they will find for defendants. The plaintiff had judgment.

Henry Flanagan, for appellant.

McFarlane, Jones & Carkener, for respondent; also, *R. W. Jones*. No interest in the life is necessary at common law. *Dalby v. The India and L. Life A. Co.*, 15 Com. Bench, 365; *British Ins. Co. v. Magee*, Cook & Alcock (Irish), 182; *Scott v. Roose*, Long. & Town (Irish), 54; *Shannon v. Nugent*, 1 Hays, 536-539; *Bunyan on Life Ins.*, p. 11; *Law v. London Indisputable L. P. Co.*, 1 Kay & Johnson, 223; *Rawls v. Ins. Co.*, 3 Am. Law Reg. (N. S.) see note of Judge DWIGHT at page 179, par. 2 *et seq.*; *Bliss on Life Ins.*, § 3; *Trenton Mutual L. I. Co. v. Johnson*, 4 Zab. 576; *Chisholm v. Nat. Cap. L. I. Co.*, 52 Mo. 213. The burden to show the policy void is on defendant. *Peltz v. Long*, 40 Mo. 532; *Sumner v. Summers*, 54 id. 340; *Cheltenham v. Cook*, 44 id. 29; *Sherwood v. Saxton*, 63 id. 78-84; *Gardner v. Armstrong*, 31 id. 535; *Shannon v. Nugent*, 1 Hays, 536; *Lewis v. Phoenix M. Ins. Co.*, 39 Conn. 100; *Piedmont & Arlington L. I. Co. v. Ewing*, 3 Cent. L. J. 686; *Evers v. Life Asso. America*, 59 Mo. 431.

HENRY, J. Plaintiff sued defendants on a policy of insurance issued by the St. Louis Mutual Life Insurance Company, on the life of John T. Anderson, procured by plaintiff, who paid the premiums, and was to receive the amount for which said life was insured by said company, on the death of said Anderson.

Plaintiff was an uncle of John T. Anderson, but it was neither alleged nor proved by plaintiff that he had any pecuniary interest in his life, and the mere relation of uncle and nephew does not con-

stitute an insurable interest, to enable either to insure the life of the other. It is maintained with great ability by Messrs. McFarlane and Jones, attorneys for plaintiff, that a policy of insurance, effected by one on the life of another in which he has no pecuniary interest, is valid; and they rely upon *Chisholm v. Nat. Capitol Life Ins. Co.*, 52 Mo. 213; 14 Am. Rep. 414, in which this court, WAGNER, J., said: "In this State we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in anywise against or contrary to public policy." These remarks, of course, are to be restricted to the case then under consideration. The plaintiff there had insured the life of Clark, between whom and herself there was a marriage engagement, and the court held that she had a pecuniary interest in the life of Clark, remarking that "had he observed and kept the same (his contract of marriage), then, as his wife, she would have been entitled to support. Had he lived and violated the contract, she would have had her action for damages." There are intimations in the opinion which support the views urged by respondent's attorney, but they are *obiter dicta*. The case of the *Trenton Mut. Life and Fire Ins. Co. v. Johnson*, 4 Zab. 576, is approvingly cited by the court, but a different doctrine from that announced in that case has been held in Massachusetts, New York, Connecticut, Maine, Rhode Island, Indiana, by the Supreme Court of the United States, by DILLON, J., in *Swick v. Home Ins. Co.*, 2 Dillon, 161, and in this State in *McKee v. Ins. Co.*, 28 Mo. 383. And in *Gamb v. Covenant Mut. Life Ins. Co.*, 50 id. 44, it was held indirectly that a person procuring an insurance on the life of another must, to make it valid, have a pecuniary interest in the life insured. In the latter case, BLISS, J., said: "Gambling, or wager policies, are those where the persons for whose use they issue have no pecuniary interest in the life insured. But the wife has a direct interest in the life of her husband." In the former case, SCOTT, J.: "There is nothing in the contract as stated in the petition which shows it to be a wagering one, or in anywise contrary to public policy."

He then proceeds to show that the plaintiff had a pecuniary interest in the life of the husband, which she insured for her benefit. In *Evers v. The Life Association*, 59 Mo. 430, WAGNER, J., who

delivered the opinion of the court, did not seem entirely satisfied with *Chisholm v. Nat. Capitol Life Ins. Co.* He said: "Our opinion on this subject was expressed in *Chisholm v. Nat. Capitol Ins. Co.*, 52 Mo. 213; 14 Am. Rep. 414, to some extent, but it is not necessary to examine the question further in this case, as the plaintiff's own instructions assume that such an interest is necessary." As the observations of our court on this subject in the case referred to are *obiter dicta*, the question may be considered an open one in this State. In his Commentaries, vol. 3, p. 462, Chancellor KENT said: "But policies, without interest upon lives, are more pernicious and dangerous than any other class of wager policies, because temptation to tamper with life is more mischievous than incitement to mere pecuniary fraud." In *Lord v. Dall*, 12 Mass. 115, it was held "that unless the assured had an interest in the life insured, it would be a mere wager policy, which we think would be contrary to our laws, and, therefore, void." In *Stevens, adm'r, v. Warren, adm'r, and another*, 101 Mass. 564, *Lord v. Dall* was cited and approved, and WILLIS, J., speaking for the court, said: "The general rule recognized by the courts has been that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life." To the same effect are the cases of *Mitchell v. Union Life Ins. Co.*, 45 Me. 104; *Lewis v. Phoenix Mut. Life Ins. Co.*, 39 Conn. 101; *Bevin v. The Con. Mut. Life Ins. Co.*, 23 id. 244; *Mowry v. Home Life Ins. Co.*, 9 R. I. 346; *Franklin Life Ins. Co. v. Hazard*, 41 Ind. 117; 13 Am. Rep. 313; *Ruse v. Mut. Benefit Life Ins. Co.*, 23 N. Y. 516; *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. 247; *Cammack v. Lewis*, 15 Wall. 643; *Swick v. Home Ins. Co.*, 2 Dill. 161; May on Ins., § 587, p. 724.

Neither the case of *Shannon v. Nugent*, Hays' Reports of cases in the Irish Court of Exchequer, p. 539, nor *Ferguson v. Lomax*, 2 Drury & Warren's Reports of cases decided in the English High Court of Chancery, cited in *Chisholm v. Nat. Capitol Life Ins. Co.*, *supra*, sustains the doctrine contended for by respondent. In the latter case the question was neither considered by the court nor presented in the brief of counsel, and in the former JOY, C. B., speaking for the court, said: "It is not now necessary for us to decide whether a life insurance made in Ireland must be on interest." He stated, however, that the leaning of the court was, that interest was not necessary to give it validity. We feel constrained, therefore, by the weight of authority, to hold that the policy of insur-

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ance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy, and, therefore, void. This policy upon its face does not state an interest, nor in the application is it stated that Singleton had a pecuniary interest in the life of Anderson. The following question was propounded to the applicant: "Has the beneficiary (if a creditor) an interest in the life to be assured, to the full amount of this application?" To which he answered "No." He does not state that he is a creditor. It was neither averred in the plaintiff's petition, nor proved, that plaintiff had any pecuniary interest in the continuance of the life of John T. Anderson. The following instruction, asked by defendant, the court refused: "That to entitle plaintiff to recover in this action he must show some insurable interest in the life of John T. Anderson, the insured, and that in the absence of any evidence showing or tending to show such insurable interest, the jury must find for defendant."

Plaintiff's counsel contend that it devolved upon defendant to show that plaintiff had no such interest, and several cases from our own reports are relied upon as authority for this position. In the earlier of these cases all that was determined was that when a contract was good at common law, without being reduced to writing, after the passage of the statute of frauds it was matter of defense to be pleaded that the contract was not in writing. The case here is of a contract void at common law, upon its face, and of course it devolves upon plaintiff to show such facts as render it valid and binding. In *Freeman v. Fulton Fire Ins. Co.*, 38 Barb. *supra*, the court said: "It must be considered as well settled at present that at common law, as well as under the statute of betting and gaming, a policy of fire insurance is void, unless the party has at the time an insurable interest. It follows that a complaint in an action on the policy must contain an averment of such an interest, in order to state a cause of action." "The plaintiff must aver an insurable interest, or if he has not that, the grounds upon which he rests his right to sue." May on Insurance, § 587. In *Ruse v. The Mutual Benefit Life Ins. Co.*, *supra*, in which the opinion was delivered by that able jurist, Judge SELDEN, the court said: "And it is apparent from the authorities, that it had always been previously held in suits upon the policies, not containing the words, 'interest or no interest,' or other equivalent words, that the

plaintiff must aver and prove that he had an interest." This was said in reference to *Depaba v. Ludlow*, Comyn, 361, which shows how the doctrine that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, "interest or no interest," and it was held that the import of that clause relieved plaintiff from proving his interest. That the plaintiff must, in these cases, aver and prove an interest, was held in the Supreme Court of Illinois, in *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180, and that he must prove the same affirmatively as a part of the case.

The court below erred in refusing to give defendant's tenth instruction, and for that error the judgment must be reversed. The court did not err in excluding statements made by John T. Anderson, as to how he had been afflicted, and did properly admit statements made by him to witnesses, whether medical men or not, which were expressions of his feelings at the time. 1 Greenl. on Ev., § 101. Nor was it necessary to make such statements admissible that they should have been made in answer to inquiries as to his health, or observations of others as to his appearance, etc. But they must not have been made too long before the application to throw any light upon the condition of his health when the application was made. We think evidence properly admissible to show in what sense the term "spitting of blood," was used in the application. Without any evidence of the meaning of that term, the court might properly have instructed the jury that "spitting of blood," in consequence of a drawn tooth, or a cut on the gums, was not meant by that term, and yet if Anderson had spit blood from such trivial causes, literally his answer to the question would have been false. There was, therefore, a propriety in the admission of evidence of the meaning of the term. There is something ambiguous in the term "spitting of blood." There is room for interpretation. Literally, the meaning is spitting blood, whether from the teeth, gums or lungs, but it would be absurd to hold that it was used in that sense in the application. We have given two instances of spitting blood, which no court would hold as embraced within the term "spitting of blood," as used in that application. Hence, the necessity for an explanation; "spitting of blood," is, and was proved to be, a technical term. Other errors are assigned, but it is unnecessary to consider them. We are all agreed that the

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judgment should be and it is accordingly reversed, and the cause remanded.

Judgment reversed.

NOTE BY THE REPORTER.—In *Missouri Valley Life Ins. Co. v. Sturges*, 18 Kans. 93; 26 Am. Rep. 761, it was held that the assignee, with the consent of the company, of a policy of life insurance could not recover on it unless he had an insurable interest in the life of the assured. To the same effect is *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; and the Supreme Court of Massachusetts, in *Stevens v. Warren*, 101 Mass. 564, held that the assignment passed no interest if made without the consent of the company. See, also, *Cammack v. Leves*, 15 Wall. 643, which was a case of peculiar circumstances. On the other hand the Supreme Court of Rhode Island, in the recent case of *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496, held that where the policy contained no prohibition of such alienation, an assignment, in good faith and not as a device to evade the law, was good, and gave a right of action to the assignee. See, also, *St. John v. Am. Mut. Life Ins. Co.*, 2 Duer, 419; s. c., on appeal, 13 N. Y. 31; *Valton v. Nat. Fund Life Assurance Co.*, 30 id. 33; *Cunningham v. Smith*, 70 Penn. St. 450. To the same effect are *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Aetna Life Ins. Co. v. France*, id. 561.

A distinction is observable between the case of a policy without interest in its origin and a policy originally valid but assigned to one who has no interest. This was taken in the *Valton Case*, *supra*, where the court said: "It is unnecessary to determine whether previous to the statute making void all wagers, bets, etc. (1 R. S. 663), an insurance, effected by a party upon the life of a person in which he had no interest, was valid. Since the statute, such contract would clearly be void. Upon the trial there was no proof but that Schumacker obtained the policy for his own benefit. If he so obtained it, he had the right to dispose of it as he saw fit, and it would be no defense against his assignees that they had no interest in his life." *Contra*, *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; 13 Am. Rep. 313, where the court say: "Now if a man may not take a policy directly from the insurance company, upon the life of another in whose life he has no insurable interest, upon which principle can he purchase such policy from another? If he purchase a policy as a mere speculation, on the life of another in whose life he has no interest, the door is open to the same demoralizing system of gaming, and the same temptation is held out to the purchaser of the policy to bring about the event insured against, equally as if the policy had been issued directly to him from the underwriter." Approving *Stevens v. Warren*, and disapproving the *Valton case*.

In *Cunningham v. Smith* the court say: "The defendants may have had such an interest in the life insured under the contract of September 1, 1868, as would entitle them to insure his life in their own names. That, however, might have been a question. But Jerome Smith's interest in his own life was unquestionable, and if he was willing to insure himself with their money and then assign the policy to them, there is no principle of law which can prevent such a transaction."

The Supreme Court of the United States in *Aetna Life Insurance Company v. France*, *supra*, consider the question whether a sister has an insurable interest in the life of a brother upon whom she is not dependent for support. The court says in affirming the judgment of the court below: "The construction given to the policy by the court below was, that it was a contract between the company and Chew for an assurance of his life, with a stipulation and agreement that the money should be paid to his sister; and the court held that such a policy is sustainable at law on account of the nearness of the relationship between the parties, and especially as Mrs. France, at the time the insurance was effected, was one of Chew's next of kin, prospectively interested in his estate as a distributee. We concur in the construction of the policy made by the court, and in the validity of the transaction. As held by us in the case of *The Connecticut Mutual v. Schaefer*, just decided, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment."

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"He had a right to take out a policy on his own life for his sister's benefit; and she had a right to advance him the necessary means to do so. As between strangers, or persons not thus nearly connected, such a transaction would be evidence to go to the jury, from which, according to the circumstances of the case, they might or might not infer that it was mere gambling. But as between brother and sister, or other near relations, desirous of thus providing for each other, and (as said by Chief Justice SHAW) presumed to be actuated by "considerations of strong morals, and the force of natural affection between near kindred operating often more efficaciously than those of positive law" (*Loomis v. Eagle Life Insurance Co.*, 6 Gray, 399), the case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it. On this ground we hold, that where, as in this case, a brother takes out a policy on his own life for the benefit of his sister, it is totally immaterial what arrangement they choose to make between them about the payment of the premiums. The policy is not a wager policy. It is divested of those dangerous tendencies which render such policies contrary to good morals. And as the company gets a perfect *quid pro quo* in the stipulated premiums, it cannot justly refuse to pay the insurance when incurred by the terms of the contract."

In *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186; 20 Am. Rep. 532, it was held, that in an action by a wife to recover the amount of an insurance policy issued to her upon the life of her husband, evidence of the declarations of the husband made to third persons prior to the insurance, when speaking of an existing disease, was competent upon the question of the truthfulness of statements made in the application. The application was made Aug. 20, 1870, and the declarations were made in the preceding winter. The court say: "Hence it is that any prior act or fact, not too remote, is proof against the policy-holder, of knowledge concealed by the subject of the insurance. Hence it is, too, that any statement which is part of the *res gestæ* of such prior fact or act tending to characterize or explain it, is also proof thereof, though unsworn to. Facts occurring after the insurance has been effected may be evidence, inasmuch as all facts which are material are competent to be proven. But the subsequent statements of the subject of insurance, not connected with a contemporary act or fact, are then but hearsay," etc. The "fact or act" in that case was that the insured looked ill and walked lame, and his contemporaneous declarations respecting those circumstances were received in evidence.

This was followed in *Dilleber v. Home Life Ins. Co.*, 69 N. Y. 256, where it was held that the "fact" being otherwise proven, as by letters of the insured, his declarations concerning it are competent to show knowledge.

In *Ashbury Life Ins. Co. v. Warren*, 66 Me. 523; 22 Am. Rep. 590, the policy was in favor of a brother upon the life of his sister, and issued Oct. 3, 1873. Evidence of her complaints of illness made in the preceding summer were excluded. This was held error. Evidence of her declarations "descriptive of her health and feelings at the time they were uttered" were held competent, but otherwise as those "concerning the cause of her then present sufferings, and the length of time they had existed."

A son has an insurable interest in the life of his father, especially when the son is liable under the poor laws for the support of the father. *Reserve Mutual Ins. Co. v. Kane*, 81 Penn. St. 154; 22 Am. Rep. 741.

The relation of father and son does not give the son an insurable interest in the life of the father, unless the son has a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father. *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180.

A father has an insurable interest in the life of his minor son. *Loomis v. Eagle Life and Health Ins. Co.*, 6 Gray, 399.

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STATE V. WINGO.

(86 Mo. 181.)

Criminal law — burden of proof.

In criminal prosecutions the burden of proof remains upon the State throughout the trial to establish the guilt of the prisoner beyond a reasonable doubt upon the whole evidence, and an instruction that if defendant killed deceased, he is presumed guilty of murder, in the absence of proof to the contrary, and that it devolves upon him to show a mitigation or justification, is erroneous.*

INDICTMENT for murder. The opinion states the facts.

Luther T. Collier, for appellant.

J. L. Smith, attorney-general, for the State, cited *State v. Joeckel*, 44 Mo. 234; *State v. Lane*, 64 id. 319; *State v. Hundley*, 46 id. 414; *State v. Hays*, 23 id. 287; *State v. Underwood*, 57 id. 40; *State v. Starr*, 38 id. 270.

HENRY, J. That it devolves upon the State to establish by evidence the guilt of the accused beyond a reasonable doubt will not be controverted. The defendant, by his plea of not guilty, puts in issue every material allegation in the indictment. He is not required to plead specially any matter of justification or excuse. The case is not divided into two parts, one of guilt asserted by the State, the other of innocence, asserted by the accused. He does not plead affirmatively that he is innocent, but negatively that he is not guilty; and on that issue, and that alone, the jury are to try the case throughout.

There is no shifting of the burden of proof. It remains upon the State throughout the trial. The evidence may shift from one side to the other. The State may establish such facts as must result in a conviction, unless the presumption they raise be met by evidence, but still the burden of proof is on the State to establish the guilt of the accused beyond a reasonable doubt. *Ogletree v. State*, 28 Ala. 693; *Tweedy v. The State*, 5 Iowa, 433; *Com. v. McKie*, 1

* See *People v. Schryver* (43 N. Y. 1), 1 Am. Rep. 430.

Gray, 61; *State v. Flye*, 26 Me. 316; Wharton's Am. Crim. Law, § 707.

In *Stokes' case*, 53 N. Y. 164; 13 Am. Rep. 492, RAPALLO, J., said: "The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defense, that they must convict unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner, and subjects him to conviction though the evidence on his part may have created a reasonable doubt of his guilt. Instead of leaving it to them to determine upon the whole evidence whether his guilt is established beyond a reasonable doubt, it constrains them to convict unless they are fully satisfied that he has proved his innocence."

Wharton, in his work on American Criminal Law, § 707, says: "The principle may be broadly stated that when the defendant relies on no separate, distinct and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof continues throughout with the prosecution."

The same doctrine is held in Massachusetts in all criminal cases, except homicides. In *Com. v. McKie*, 1 Gray, 61, it is distinctly and clearly announced, and the distinction betwixt cases of homicide and other criminal cases recognized. No such distinction, however, has obtained in this State, and there can be no good reason why it should prevail anywhere. A distinction between felonies and misdemeanors throwing the burden of proof on a defendant indicted for a misdemeanor, to establish his justification or excuse after the State has made a *prima facie* case against him, would certainly be more reasonable and more in consonance with the merciful maxims in favor of life and liberty than that which is recognized in Massachusetts. The higher the grade of the offense the stronger the reason why the burden of proof should remain upon the State throughout.

In *The Com. v. York*, 9 Metc. 122; *Com. v. Knapp*, 10 Pick. 484, and *Com. v. Webster*, 5 Cush. 295, it was held that when one kills another it devolves upon the defendant, when the State has proved that he was the slayer, to establish circumstances of justification by such evidence as will outweigh or overbalance

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the evidence which it is brought to control, while in all other criminal cases a different rule is applied. It is conceded in that case, and in fact all the cases which we have examined, that the burden is not shifted by proof of voluntary killing when there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide. As stated by SHAW, C. J., in *York's case*, "when the fact of voluntary homicide is shown, and this is not accompanied with any fact of excuse or extenuation, malice is inferred from the act; this is a fact which may be controlled by proof, but the proof of it lies on the defendant, and if not so proved, it cannot be taken into judicial consideration." In *Com. v. McKie, supra*, BIGELOW, J., delivering the opinion of the court, observed: "But can the government in such a case, on proving simply the injury to the person, rest their case, and call on defendant to assume the burden of proof and satisfy the jury that it was accidental, or else submit to a conviction? If so, then a criminal charge can always be shown by proving part of a transaction, and the burden of proof can be shifted upon the defendant by a careful management of the case on the part of the government, so as to withhold that part of the proof which may bear in his favor." That was an indictment against McKie for assault and battery, and the observations and reasoning of the learned judge would apply with equal force to a case of homicide where the distinction in that respect, between cases of homicide and other criminal cases, does not prevail as in Massachusetts.

The State's interest is not promoted by the conviction and punishment of any of her citizens for crimes of which they are innocent, and it is as much the duty of those who represent her to protect the innocent as to convict the guilty. If the Massachusetts doctrine in regard to homicide be correct, the prosecuting attorney has but to introduce those witnesses who saw nothing to justify the defendant, to throw the burden of proving his innocence upon the defendant, and impose upon him the duty of proving by a preponderance of evidence, as in civil cases, the facts he relies upon for justification or excuse. This is "the careful management of a case on the part of the government" by which the burden is shifted in Massachusetts in prosecutions for homicide.

The defendant is entitled to the benefit of a reasonable doubt of his guilt on the whole case, not only as to whether the case made

by the State is open to reasonable doubt, but if the evidence for the State be clear, and, in the absence of other evidence, conclusive, still if the evidence adduced by the accused, whether it establishes the facts relied upon by a preponderance of evidence or not, creates a reasonable doubt of his guilt in the minds of the jury, he is entitled to an acquittal. At no stage of the trial does he stand asserting his innocence. The authorities for this proposition are numerous. All the Massachusetts cases before cited, except those which were prosecutions for homicides, fully sustain it. To the same effect is *Tweedy v. The State*, 5 Iowa, 433; *State v. Morphy*, 33 id. 270; 11 Am. Rep. 122; 32 Iowa, 52; *Stokes v. People*, 53 N. Y. 165; 13 Am. Rep. 492; *State v. Merrick*, 19 Me. 400; *State v. Flye*, 26 id. 312; *Chaffee v. U. S.*, 18 Wall. 516; Wharton's Am. Crim. Law, § 707; *Com. v. Kimball*, 24 Pick. 373; *Com. v. Dana*, 2 Metc. 340; *Com. v. Bradford*, 9 id. 270.

In the case at bar, defendant was indicted for murder, charged with having killed one Gamble, and the evidence was that on the 10th of September, 1876, the defendant and one Caldwell walked to Grand river from Spring Hill and returned that evening. They had both been drinking, and defendant was so drunk that Caldwell left him on the road side and proceeded home. He reached home about dark, and deceased, who had been there for him in his absence, returned. They had some conversation in regard to the employment of Caldwell by deceased to work for him, when Caldwell said he had left defendant on the road side, and had promised to return for him. Deceased said he would accompany him. Caldwell walked and deceased rode his horse. When they got to defendant, deceased dismounted and let defendant ride. They returned to Spring Hill and went to Caldwell's house. Defendant said he would lie down on the lounge. He had his gun with him and placed it near the head of the bed. Caldwell and deceased were outside, sitting on a porch which extended nearly across the house. After defendant had been lying down about fifteen minutes, he got up, got his gun, went to the door with the breech of the gun raised as high as his head, and said to Caldwell and deceased, "God damn you, if you don't come into the house and quit talking about me, I will mash you both into the earth." The deceased said he allowed no man to draw a gun on him, "and fired upon defendant, shooting him in his privates." Gamble was sitting when he fired, and immediately defendant shot and killed him with his gun. There

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was no testimony showing that defendant made any attempt to strike Caldwell or deceased with the gun.

Among other instructions, the court gave the following :

1. That if in the month of September, 1876, in Livingston county, the defendant willfully shot and killed Henry Gamble, the jury will find him guilty of murder in the second degree and assess his punishment, etc.

3. If defendant shot and killed Gamble, the law presumes that it is murder in the second degree, in the absence of proof to the contrary, and it devolves upon the defendant, Wingo, to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense.

The instructions for the accused were on the theory of self-defense. There was an instruction declaring what was a reasonable doubt, but no instruction that if the jury had such doubt of defendant's guilt, he was entitled to an acquittal. Applying as tests, the principles above stated, are those instructions such as should have been given? We are not inclined to seek for unsubstantial, metaphysical subtleties, or to indulge in hypercriticism of instructions or rulings of the trial courts to screen offenders from merited punishment, but there are certain great principles imbedded in American criminal jurisprudence which secure a fair trial to citizens accused of crime, and which, however often invoked successfully to procure the acquittal of the guilty, cannot be ignored without imperilling the most sacred rights of the citizens. One of them requires that the State shall establish the guilt of the accused beyond a reasonable doubt. The third instruction declares that if the State prove that defendant killed Gamble, it devolves upon defendant to show, from the evidence, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense. What is its meaning? "It lieth upon the party indicted to prove the sudden quarrel." "Must prove his case to the satisfaction of the jury." "It is incumbent on the prisoner to make out, etc." "The circumstances are to be satisfactorily proved by the prisoner." "These various expressions," says SHAW, C. J., in *York's case*, "we consider as meaning the same thing." Again he says, "it is hardly necessary to cite authorities to the very familiar principle that when a fact is to be proved, it must be by evidence sufficient to lead a jury to believe it, and that for this purpose it must outweigh or overbalance the evidence which it is brought to control."

We think that he was correct in stating that these various expressions mean the same thing, and, if so, the third instruction shifts the burden upon defendant to prove his innocence. It must be borne in mind that a declaration that, if the State has made out a *prima facie* case, it devolves upon the defendant to adduce evidence to repel it, is very different in substance and effect from one which declares that he shall establish the facts upon which he relies as a justification to the satisfaction of the jury—or by a preponderance of evidence, for they are identical in meaning. The difference is as to the amount of evidence. We are not without authority in support of this proposition.

In the *Com. v. McKie*, *supra*, the defendant was indicted for an assault and battery, and the trial court instructed the jury “that the burden of proof was on the government to satisfy the jury that defendant did strike Eaton with a dangerous weapon, in the manner alleged in the indictment, and that, if the government failed in this, they should acquit the prisoner, but that if this was proved beyond a reasonable doubt, the burden was then on the defendant to satisfy the jury of the justification, to wit: the spitting in the face of the defendant, which was the only justification contended for or relied upon, and if the jury were not satisfied of the fact relied upon for a justification, but were satisfied that the government had made out the allegation in the indictment, their verdict must be against the defendant.”

The Supreme Court of Massachusetts held this an erroneous instruction, and BIGELOW, J., speaking for the court, said: “However the rule may be in cases where the defendant sets up, in answer to a criminal charge, some separate, distinct and independent fact or series of facts, not immediately connected with and growing out of the transaction on which the criminal charge is founded, there can be no doubt that in a case like the present the burden of proof remains on the government throughout to satisfy the jury of the guilt of the defendant.” In other words, the court held that the instruction shifted the burden of proof on the defendant, and was, for that reason, erroneous.

In the *State v. Porter*, 34 Iowa, 139, the jury was instructed as follows: “If you find from the evidence that the defendant killed or caused the death of John Porter, and if you further find that he was acting in self-defense in so doing, it will be your duty to acquit him; or if you find that Porter attacked the defendant, and that

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the defendant only used such force as was necessary to repel the assault, he would not be guilty as charged, even if death did result therefrom. If, however, you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defense." DAY, J., speaking for the court, said: "The instruction is clearly erroneous. Proof is the result of evidence. No fact can legally be said to be proved unless it is established by at least a preponderance of evidence. The party upon whom rests the burden of proof must establish the fact respecting which the burden is cast upon him, by at least a preponderance of evidence."

Again, "Under the rule laid down, the defendant must establish, by a preponderance of evidence, that he acted in self-defense, or the jury would be required to find him guilty; whereas, he is entitled to an acquittal if he shows by the facts attending the commission of the offense, proved either by himself or the State, that there is reasonable doubt that his act was willful. The rule is different where the matter of defense is wholly disconnected from the body of the offense."

In the *State v. Merrick*, 19 Me. 401, WESTON, J., speaking for the court, said: "When, by opposing testimony, reasonable doubt is thrown upon a *prima facie* case of guilt, it can no longer be said that the party accused is proved guilty beyond a reasonable doubt. The jury are to judge upon the effect of the testimony taken together. It was in our judgment too strong to instruct the jury that they must convict the accused, unless he had proved, to their reasonable satisfaction, that he came by the sheep otherwise than by stealing."

In the *State v. Flye*, 26 Me. 312, defendant was indicted for forging an order, and the court instructed the jury "that if it was proved that the order came into the hands of defendant unaltered, and came out of his hands altered, the burden was on the defendant to prove that he did not alter it." The court said, TENNEY, J.: "By the instruction, the fact of the alteration between the time when the order came into the defendant's hands and when it came out, threw a burden on to the defendant. What was that burden? It was not merely to give such an explanation as would raise a reasonable doubt of his guilt, or even to render it probable that he did not alter it; but to establish as a fact, a truth, a reality, that he did not do it." The court held that the instruction

was erroneous, and said : " The prosecuting party is bound to make out his case, in civil proceedings, to the satisfaction of the jury and in criminal, beyond a reasonable doubt. The burden of proof does not shift from the party upon whom it was originally thrown, upon the production of evidence by him sufficient to make out a *prima facie* case. But when the other party relies upon facts to establish another and distinct proposition, without attempting to impugn the truth of the evidence against him, it is otherwise. If the result of the case depends upon the establishment of the proposition of the one on whom the burden was first cast, the burden remains with him throughout, though the weight of evidence may have shifted from one side to the other, according as each may have adduced fresh proof." Again, " There is a wide distinction between a requirement in a criminal prosecution that the accused shall prove his innocence where a presumption is raised against him, and the necessity of explaining in some degree the fact on which that presumption rests."

Here it may be remarked that the State never makes other than *prima facie* case before the evidence for the defense is heard. No matter how positive and direct the testimony may be, it is still but a *prima facie* case.

Chaffee v. United States, 18 Wall. 517, was an action of debt for a statutory penalty, and FIELD, J., delivering the opinion of court, commenting upon the instruction given, to which exceptions were taken, said: " The purport of all this was to tell the jury that although the defendants must be proved guilty beyond a reasonable doubt, yet, if the government had made out a *prima facie* case against them, not one free from all doubt, but one which discloses circumstances requiring explanation, and the defendants did not explain, the perplexing question of their guilt need not disturb the minds of the jurors; their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt. In other words, the court instructed the jury in substance, that the government need only prove that the defendant was presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not, they were guilty beyond a reasonable doubt. We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it. The instruction sets at naught established principles, and justifies the criticism

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of counsel, that it substantially withdrew from defendant their constitutional right to a trial by jury, and converted what at law was intended for their protection, the right to refuse to testify, into the machinery for their sure destruction." He cites in support of the views of the court, *Doty v. The State*, 7 Blackf. 427; *State v. Flye*, 26 Me. 312; *Com. v. McKie*, 1 Gray, 61.

The instruction condemned in the several cases above cited are in substance identical with the third instruction for the State in the case at bar, and we think the court erred in giving it, especially as there was no instruction declaring to the jury that if they had a reasonable doubt of his guilt, on the whole case, they should acquit the prisoner.

The first instruction should have been qualified. The evidence for the State raised a question as to whether the defendant made an assault upon deceased, which justified the deceased in shooting him, and whether defendant was acting in self-defense when he shot the deceased; and all the cases hold that, when that is so, an unqualified instruction, such as we are considering, should not be given.

The judgment is reversed and the cause remanded.

All concur. NORTON, J., and HOUGH, J., concur in the result.

Judgment reversed.

EX PARTE RENO.

(86 Mo. 206.)

Pardon — revocation.

A pardon, properly attested, authenticated, and delivered, is irrevocable; delivery to the person suing for it is effectual;* and it is not void although not registered in the office of the secretary of State, where all official acts of the governor are required by law to be registered.

HABEAS CORPUS. The opinion states the facts.
Ewing & Pope, for petitioner.

J. L. Smith, attorney-general, for respondent.

* See *In re Edymoin*, 8 How. Pr. 478.

NORTON, J. This is a proceeding by *habeas corpus*, on the part of John Reno, who alleges in his petition that, on the 16th day of January, 1868, he was convicted by the Circuit Court of Daviess county of burglary and larceny, and his punishment assessed at twenty-five years' imprisonment in the penitentiary; that he is now confined in said penitentiary by the warden thereof, under said judgment and commitment; that on the 8th day of January, 1873, his sentence and punishment was commuted to ten years' imprisonment by B. Gratz Brown, the then governor; that he has served out his commuted sentence of ten years, and is entitled to his discharge, but that, notwithstanding this fact, he is still detained by James R. Willis, the warden, in confinement in said prison, who refuses to discharge him.

To the writ issued on the petition, the said Willis makes return and admits that he holds said Reno in custody by virtue of the judgment and sentence of the Circuit Court of Daviess county, sentencing him to twenty-five years' imprisonment from the 16th day of January, 1868, but denies that said sentence has been commuted as alleged, and denies that petitioner is entitled to his discharge.

Petitioner filed his plea of commutation, which sets out the original pardon, signed by Governor Brown, as the ground upon which he claims his discharge. This we shall treat as an answer to the return, and shall consider the replication filed thereto as making up the issues in the case.

In reply it is admitted that the then acting governor, B. Gratz Brown, on the 8th of January, 1873, issued a paper attached to the plea, but it is denied that it had the effect to commute the punishment of petitioner from twenty-five years to ten years.

1st. Because it was never delivered;

2d. Because it was never registered in the office of the secretary of State;

3d. Because the condition, requiring it to be registered in said office, was never complied with, and it was never entered on the prison records;

4th. Because said pardon or commutation was revoked by Governor Woodson, the successor of Brown.

It may be observed, as preliminary to the consideration of these questions, that a pardon or commutation is a mere matter of grace, and until this act of clemency is fully performed, neither benefit

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nor rights can be claimed under it. Simple intention on the part of the executive to bestow a pardon confers no right, and is perfectly nugatory until the intention may be said to be fully completed. This intention may be said to be fully completed when the pardon is signed by the executive, properly attested, authenticated by the seal of the State, and delivered, either to the person who is the subject of the favor, or to some one acting for him, or on his behalf. Whenever these things are done, the grantee, or donee of the favor, becomes entitled as a matter of right to all the benefits and immunities it confers, and of which he cannot be deprived by revocation or recall. *Commonwealth v. Halloway*, 44 Penn. St. 218. If these are correct principles governing such cases, and we think they are, the application of them to the evidence in this case will render the solution of the questions presented for our determination free from difficulty.

It is not pretended that the commutation, reducing the punishment of petitioner from twenty-five to ten years, was procured by fraudulent or corrupt practices. On the contrary, Governor Brown testifies that he was induced to issue it from the conclusion which he had reached after much consideration, that ten years' imprisonment was a sufficient punishment in any case where the party was sentenced for an offense committed against property. That he intended to issue the pardon, and in point of fact did issue it, is clear beyond controversy, and indeed, stands admitted in the pleadings.

Was it delivered by him to the prisoner or any one for him? We think the evidence shows that it was. Governor Brown testifies that on the morning of the last day of his term of office, when he went to his office, he found persons there to remind and urge anew the matter of Reno's pardon; that he went to the office of the secretary of State, got a pardon in the usual form filled in, with the exception of the term and the name, took it to his office, and, after some little further thought, inserted the name and the reduction of his term of imprisonment to ten years, and handed the paper to one of the parties present in the ante-room, stating that it must be inscribed at the prison, and filed in the office of the secretary of State before twelve o'clock, or he should consider it invalid, as he would be out of office at that hour. Now, it is impossible for the mind to resist the conclusion that the person, to whom the pardon was delivered, was acting for and on behalf of

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Reno. If so, the delivery was complete, and the right of Reno to the benefit it bestowed became fully established. But the delivery is further shown by the evidence of Bradbury, who was a deputy warden of the prison on the 8th of January, 1873, and who swears that, in the evening of that day, he saw the commutation in the hands of Dougherty, the warden, who directed his clerk Haly to make an entry of it on the prison records; that the clerk, thereupon, with the paper before him lying on the table, made the following entry opposite the name of Reno, "commuted from twenty-five years to ten;" that he was looking over the shoulders of the clerk and saw him make the entry; that about one month afterward he examined the prison records and found that the entry had been erased, and that afterward he found that part of the leaf on which it was made entirely torn off.

Thompson, who was the prison physician, testifies that on the morning of the 8th of January, 1873, about 11 o'clock, Dougherty, the warden, told him that Reno's sentence had been commuted to ten years, and handed him an official envelope from the secretary of State's office; that he took it out of the envelope; that it had upon it the seal of the State and the signature of the governor; that he did not read it, but accepted the statement of Dougherty as to what it was.

It thus appears that the pardon, after it passed from the hands of Governor Brown, was delivered to the warden, Dougherty, who, as the evidence shows, was the customary recipient of such papers, in an official envelope from the office of the secretary of State, on the morning of the day it issued, and that it was entered on the prison records in the afternoon of that day. The subsequent erasure of this entry and mutilation of the record, by tearing off so much of it as contained the entry, cannot affect the previously invested rights of Reno, but would justly consign the parties who were engaged in it to the incarceration and punishment which they must have intended thereby to continue and perpetuate on Reno. The evidence also establishes the fact that the custom was, where a pardon was granted, to deliver it to the warden, who made, on receiving it, the appropriate entry opposite the convict's name. The person to whom Governor Brown handed the pardon was authorized to deliver it to the warden, for he testifies that he said it must be inscribed on the prison records, and expressed the opinion that it should be done by 12 o'clock, as, after that time, he

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would cease to be governor. A delivery of the pardon, under the circumstances in proof, is, *prima facie*, equivalent to delivery, or is constructive delivery to the prisoner. 44 Penn. St., *supra*.

It is, however, insisted that the pardon is void, because there was no entry made of it in the office of the secretary of State, who is required to keep a register of the official acts of the governor. It would be establishing a hard and unreasonable rule to declare that the mere omission of the secretary of State, to enter in his register that the governor had granted a pardon, would render void a pardon which was intended to be issued, and was in fact issued and delivered. The pardon in question on its face shows that it was the official act of Governor Brown, that he had a right to act on the subject to which it related, and that, in the action taken by him, he did not go beyond the scope of his power. The omission of the secretary to make an entry of the official act of the governor in granting a pardon would not have the effect to make void the pardon, any more than an entry made by him in his register that the governor had granted a pardon would impart validity to it, when, in fact, no such pardon had ever been granted. Besides, the prisoner had no authority or control over the secretary of State in regard to the performance of his duties. The principle announced above, as to the effect of the secretary's failure to enter the act of the governor in his register, is analogous to that declared in the case of *Scruggs v. Scruggs*, 41 Mo. 242, where it was held that the omission of the clerk to make the proper entry on his record as to the acknowledgment of a sheriff's deed, would not impair its validity, nor prevent the transmission of title under it. The power of the governor to grant pardons and commutations is in nowise dependent upon any entry which the law requires the secretary of State to make, nor upon any required to be made by the warden. The former requirement may be regarded as intended to preserve the evidence of the official acts of the governor, and the latter as designed to protect the warden in discharging a prisoner, who is the recipient of executive clemency. The power of the executive in this case was derived from the 6th section, article 5, of the Constitution of 1865, which provides that, "The governor shall have the power to grant reprieves, commutations and pardons after conviction for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to such

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regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the general assembly, communicate to that body each case of reprieve, commutation or pardon granted; stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the pardon, commutation or reprieve, and the reasons for granting the same."

It might, with the same show of reasoning, be contended that the failure of the governor to report the fact of a pardon, the name of the convict, etc., to the general assembly, would authorize the recapture and re-imprisonment of the prisoner, who had been discharged by virtue of a pardon, and subject the warden to prosecution for allowing an escape, as to contend that the omission of the secretary to record in his office the fact that a pardon had been granted, would render void an act of the governor, which he had the full power to perform, independent of the question whether it was, or was not, recorded.

It is objected that the entry of the pardon, in the office of the secretary of State, was one of the conditions on which it was granted, and, not being complied with, rendered it void. While the governor may grant a pardon on conditions, such conditions to be operative should appear on the face of the paper. It is also insisted that the pardon in question was revoked by Governor Woodson, who succeeded Brown, and that proof thereof is to be found in the following receipt of W. H. Dougherty, the warden, viz.:

"Received from Eugene F. Weigel, secretary of State, a letter marked 'important,' containing peremptory instructions from Silas Woodson, governor of Missouri, concerning a pardon, or other documents issued from the executive department, or secretary of State's office, of date, prior to January 11th, 1873, and not yet presented to me, at 12:45 A. M., this January 11th, 1873.

W. H. DOUGHERTY, *Warden.*"

If the purpose of the document referred to in the receipt was to revoke the commutation of Reno's sentence, it does not so appear, for no mention in terms is made of it. Its effect, according to the receipt, was to revoke only such pardons or documents as had not, up to the 11th of January, 1873, been presented to the warden. It cannot, therefore, have the effect which is claimed for it, because

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the commutation of Reno had, three days prior thereto, on the 8th of January, been presented and acted on by said warden. The case of *Moses De Puy*, reported in 3 Benedict's D. C. R. 307, to which we have been cited, has no application. The principle there decided was that to make a pardon a completed act, there must be a delivery of it to the prisoner, or some one for him, and that, until this is done, the pardon is revocable. The correctness of these declarations are undisputed by us.

The case in 44 Penn. St., *supra*, and the case of *State v. Leak*, 5 Ind. 359, to which we have been cited, do not apply, the pardon in both cases having been declared void, because they were procured by fraud and forgery.

We have already shown, that in the case before us there is no pretense of fraud in the procurement of the commutation. The prisoner having served out the full term to which his sentence was commuted, his further imprisonment is illegal. He is entitled to a discharge from the imprisonment of which he complains, and he is, therefore, by the judgment of this court, discharged therefrom.

All the judges concurring, except HOUGH, J., not sitting.

Discharged.

DRITT V. SNODGRASS.

(66 Mo. 288.)

Schools — powers of school directors to make rules — malice.

Under a statute authorizing school directors to make and enforce all needful rules and regulations for the government, management and control of the schools, not inconsistent with the laws of the land, school directors made a rule that no pupil should, during the school term, attend a social party, and expelled the plaintiff for a violation of that rule by permission of his parents. In an action for damages for such expulsion, *held*, that the directors had exceeded their powers, but inasmuch as there was no malice, willfulness or oppression, they were not liable.*

ACTION for damages for wrongful expulsion from a public school. The opinion states the case.

* See *Ferritor v. Tyler* (48 Vt. 444), 21 Am. Rep. 133.

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Rice & Walker, with J. L. Smith, for plaintiff in error.

Draffen & Williams, with James E. Hazel, for defendants in error.

HENRY, J. The cause was commenced and final judgment entered upon demurrer to second amended petition in the Circuit Court of Moniteau county, Missouri. The record consists of the second amended petition, the separate demurrer of Snodgrass and Redmond, and the separate demurrer of Frederick, and the judgment of the court upon the demurrers.

The petition avers that Joseph F. Dritt is a minor, under 21 years of age—that John B. Dritt was appointed his next friend by the clerk of the Circuit Court of said county; hence this suit is prosecuted to the use of Joseph F. Dritt, by his next friend, John B. Dritt. The petition further avers that prior to the accruing of plaintiff's cause of action the town of Tipton, in said county, had been duly incorporated, and a plat thereof filed and duly recorded in the recorder's office of said county; and that prior to the accruing of plaintiff's cause of action, by virtue of the laws of the State of Missouri authorizing cities, towns and villages to organize for school purposes, the said town of Tipton was organized as a single school district, and that it has been to this date an acting organization as such; that on, to wit, the 20th day of January, 1875, and for a long time prior and since that date, the defendants, Isaac Snodgrass and William Redmond, together with four other persons, each of whom, then being citizens and electors within said school district, were duly elected and qualified school directors within said school district, and that they were for the period aforesaid the school directors of said school district; that the said school directors, by virtue of the power and authority in them vested by law, had, prior to the date last aforesaid, established in said school district a school for the education of all the white children residing therein, between the ages of five and twenty-one years, and had employed, as the teacher of said school, the defendant, P. A. Frederick, and that the said P. A. Frederick was a legally qualified teacher to teach said school; that for a long period of time prior and subsequent to the date last aforesaid, the said school was in session with the said P. A. Frederick as teacher therein, for the purpose of the instruction and education of the youth aforesaid within said school district, in the branches of edu-

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education then being taught in said school, to wit: reading, writing, spelling, orthography, grammar, geography, arithmetic and history; that at the date last aforesaid, and during all the time subsequent thereto to this date, plaintiff has resided in said school district; that he was during all the time aforesaid, and is now, over five and under twenty-one years of age; and that he was then and is now, under the law, entitled to attend said school as a pupil, and be instructed in the various branches of education then and there being taught in said school; that prior to the date aforesaid, and for a long period of time, and up to the said 20th day of January, 1875, he was a regular pupil and scholar in said school, and received instruction in the various branches of education aforesaid; that under the law of the State he had a right to continue in said school as a pupil, and that it was not only the duty of the directors to permit him to attend said school during all the time aforesaid, but to protect him in so doing; that on, to wit, the 20th day of January, 1875, and while he was a pupil of said school and being instructed in the several branches of learning then being taught therein, the said Isaac Snodgrass and William Redmond, together with the other members of the school board aforesaid, and the said P. A. Frederick, teacher of said school, not regarding their duties aforesaid, wrongfully, illegally, oppressively, willfully and maliciously, and in abuse of their authority as school directors and teacher aforesaid, did expel this plaintiff from said school for the following reasons, and none other, to wit: That the said plaintiff did, previous to the date aforesaid, in the evening, after said school had been dismissed for the day, attend a party composed of the young people of said town, and participate in the amusements thereof; that the said board of directors and teacher of said school had made a rule for the government of said school, prohibiting the scholars from attending such parties during the continuance of said school, and that it was for a violation of this rule that he was expelled; that the said party was made up of invited guests, and that their conduct was strictly innocent, inoffensive and moral, tending only to social culture; that plaintiff was at the time about 17 years of age, and that he attended said party with the permission of his father and mother, with whom he at the time lived; that he had a right to attend said party, and that the defendants had no right or authority to dictate to or control him in the premises, and that the act aforesaid of said defendants was an abuse of any

authority conferred upon them by the laws of this State ; that the defendants have in manner and form aforesaid, ever since, to this date, prohibited the plaintiff from attending said school, whereby the plaintiff by the illegal, unlawful, willful, oppressive and malicious acts of defendants, has been deprived of the benefits of said school, and the instruction aforesaid therein, and asks damages in the sum of \$1,000. The petition is signed by Joseph F. Dritt, by Rice and Smith his attorneys.

The grounds of demurrer are, for Snodgrass and Redmond :

1st. Petition does not state facts sufficient to constitute a cause of action.

2d. It appears upon the face of said petition that the defendants were directors of said school district, and were invested with discretionary authority to make and enforce all needful rules and regulations for the government and control of said school, and they cannot be made liable to plaintiff under the allegations of the petition.

3d. Because it appears upon the face of the petition that the plaintiff has not legal capacity to sue by attorney, and he does not appear by next friend.

Grounds of demurrer on the part of Frederick:

1st. Petition does not state facts sufficient to constitute a cause of action against defendant.

2d. It appears upon the face of said petition that the defendant was the teacher in the public school in the town of Tipton, employed by the board of education of said town, and as a matter of law he is not liable to plaintiff upon the facts stated in the petition—said school being under the control and management of the board of education, and not of himself.

It appears on the face of the petition that plaintiff had not legal capacity to sue by attorney, and he does not appear by next friend.

The court sustained each of said demurrers, and entered up final judgment thereon against the plaintiff for costs; whereupon the plaintiff brings the cause to this court by writ of error.

By section 8, Wagner's Statute, page 1264, it is provided, that the board of directors "shall have power to make and enforce all needful rules and regulations for the government, management and control of such schools and property, as they shall think proper, so that the same shall not be inconsistent with the laws of the land,

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and, generally, to do all lawful acts which may be proper and necessary to carry fully into effect the purposes of the act." It appears in this case, from the petition, that the directors had made a rule for the government of said school, prohibiting its pupils from attending social parties; that the plaintiff had violated said rule, with the consent of his father and mother, and for so doing was expelled from the school, and he seeks to recover damages against the teacher and a portion of the directors for such expulsion. Is the action maintainable? Plaintiff cites many authorities as sustaining his position, and we have carefully examined them, and also those cited by the defendant, and are fully satisfied that the weight of authority is against the plaintiff.

School directors are elected by the people, receive no compensation for their services, are not always, or frequently, men who are thoroughly informed as to the best modes of conducting schools. They are authorized, and it is their duty, to adopt reasonable rules for the government and management of the school, and it would deter responsible and suitable men from accepting the position, if held liable for damages to a pupil expelled under a rule adopted by them, under the impression that the welfare of the school demanded it, if the courts should deem it improper. They are to determine what rules are proper, and who shall say that the rule adopted in this case was harsh and oppressive? I might think it was; wiser men would maintain that it was proper and right, that pupils attending social parties are liable to have their minds drawn off from their studies, and thus to be retarded in their progress; but whether the rule was a wise one or not the directors and teachers are not liable to an action for damages for enforcing it — even to the expulsion of a pupil who violates it. While this court might, on mandamus to compel the board and teacher to admit a pupil thus expelled, review the action of the board, and pass upon the reasonableness of the rule, which we do not, however, decide here, yet the doctrine that the courts could do this is very different from that which would hold the directors liable in an action for damages for enforcing a rule honestly adopted for the maintenance of discipline in the school. That such an action is not maintainable is fully established by *Donahoe v. Richards*, 38 Me. 391; *Spear v. Cummings*, 23 Pick. 224; *Stephenson v. Hall*, 14 Barb. 222. *Hodgkins v. Rockport*, 105 Mass. 475, does not support the position for which it is cited by plaintiff. By the law of that State

the school committee has the general charge and superintendence of all the public schools in the town. The plaintiff, a minor, was excluded from school for alleged misconduct, and sued to recover damages for such exclusion.

MORTON, J., speaking for the court, said: "This general power (to superintend schools, etc.), by necessary implication, includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools, and also the power to exclude a child from school for sufficient cause. And when a scholar is guilty of misconduct, which injuriously affects the discipline and management of the school, we think the law vests in the school committee the power of determining whether the welfare of the school requires his expulsion." Again, he said: "He was guilty of acts of misconduct, which, if persisted in, it is clear might seriously interfere with the discipline and impair the usefulness of the school. Whether they had such an effect upon the welfare of the school as to require his expulsion, was a question for the committee, and upon which their action is conclusive."

The case of *Morrow v. Wood*, 35 Wis. 61; 17 Am. Rep. 471, involved no principle in question here. It was an action for malicious prosecution by a teacher against the parent of a pupil whom she had flogged, for having her arrested for an assault and battery upon the child. The court held that the assault and battery was unjustifiable, and that, therefore, she could not maintain her action. Certain studies are required to be taught in the public schools of that State by statute, but the court held, as a matter of law, that the father "had a right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils." There the father desired his child not to study geography. The plaintiff (the teacher) required the boy to study geography, being fully advised that his father had forbidden the son from doing so. The boy refused to obey her in this respect, and for this was flogged. *Murphy v. The Board of Directors*, 30 Iowa, 430, was a proceeding by mandamus to compel defendant to allow plaintiff to attend school, and is no authority for the doctrine that a board of school directors is liable in damages for the expulsion of a pupil for a violation of a rule adopted by the board for the government of the school. While some respectable courts have held otherwise, the weight of authority sustains the conclusion we have reached.

In *Dinsman v. Wilkes*, 12 How. 404, TANEY, Ch. J., delivering the opinion of the court said : " But the fact to be ascertained in this case is whether, in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in the nature of a judicial discretion, he acted from improper feelings and abused the power confided to him, to the injury of the plaintiff."

In *Weaver v. Devendorf*, 3 Denio, 117, plaintiff sued a board of assessors for refusing to make an allowance or deduction in assessing his property, he being a minister, and because his property was assessed at a higher rate than that of others. The court held that the action would not lie, and BEARDSLEY, J., said : " This case might be disposed of on narrow ground, for there was no evidence to justify the conclusion that the defendants acted maliciously in fixing the value of the property of the plaintiff, or of any one else; and surely it will not be pretended that they were liable for a mere error of judgment. But I prefer to place the decision on the broad ground that no public officer is responsible in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it."

We extract copiously from these cases because they are cited by plaintiffs counsel as sustaining their view, while we think that they afford them no support whatever.

The petition alleges that the defendants illegally, wrongfully, oppressively, willfully and maliciously expelled the plaintiff, and then proceeds to state the circumstances under which the expulsion took place, viz.: the existence of the rule, and plaintiff's violation of it. The adoption of the rule is not alleged to have been prompted by malice, and if the plaintiff violated the rule, it matters not what may have been the feelings of the defendants toward him, if they enforced it in the usual and ordinary way, and the contrary is not alleged. While malice is alleged, the facts stated in the petition show that there was no such malice as gave plaintiff a cause of action against defendants for his expulsion.

We are not to be understood as holding that a board could not adopt a rule for the enforcement of which they would be liable for damages. If they should declare that for certain misconduct the teacher should inflict upon the bare back of the pupil thirty-nine lashes, well laid on, or any other rule palpably unreasonable and unauthorized, they probably could not shield themselves against an

action for damages by a pupil, under the power given them to adopt reasonable rules for the government of the school. But even this we will not now decide, for "sufficient unto the day is the evil thereof."

The judgment is affirmed.

Judgment affirmed.

NORTON, J., concurring. The directors of a school district are invested with the power and authority to make and execute all needful rules and regulations for the government, management and control of such school as they may think proper, not inconsistent with the laws of the land. Under the power thus conferred, the directors are not authorized to prescribe a rule which undertakes to regulate the conduct of the children within the district, who have a right to attend the school, after they are dismissed from it and remitted to the custody and care of the parent or guardian. They have the unquestioned right to make needful rules for the control of the pupils while at school, and under the charge of the person or persons who teach it, and it would be the duty of the teacher to enforce such rules when made. While in the teacher's charge, the parent would have no right to invade the school room and interfere with him in its management. On the other hand, when the pupil is released and sent back to his home, neither the teacher nor directors have the authority to follow him thither, and govern his conduct while under the parental eye.

It certainly could not have been the design of the legislature to take from the parent the control of his child while not at school and invested in a board of directors and teacher of a school. If they can prescribe a rule which denies to the parent the right to allow his child to attend a social gathering, except upon pain of expulsion from a school which the law gives him the right to attend, may they not prescribe a rule which would forbid the parent from allowing the child from attending a particular church, or any church at all and thus step *in loco parentis* and supersede entirely parental authority? For offenses committed by the scholar while at school, he is amenable to the laws of the school, but under the charge of the parent or guardian, he is answerable alone to him.

A person teaching a private school may say upon what terms he or she will accept scholars, and may demand, before receiving a scholar to be taught, that the parents shall surrender so much of

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his or her parental authority as not to allow the scholar during the term to attend social parties, balls, theaters, etc., except on pain of expulsion. This would be a matter of contract, and no one has a right to send a scholar to such a school except on the terms prescribed by those who teach it.

This is not so in regard to public schools, which every child within school age has a right, under the law, to attend, subject while so attending to be governed by such needful rules as may be prescribed. When the school room is entered by the pupil, the authority of the parent ceases, and that of the teacher begins; when sent to his home, the authority of the teacher ends, and that of the parent is resumed. For his conduct when at school he may be punished or even expelled, under proper circumstances; for his conduct when at home, he is subject to domestic control. The directors, in prescribing the rule that scholars who attend a social party should be expelled from school, went beyond their power and invaded the right of the parent to govern the conduct of his child when solely under his charge.

My concurrence in the above opinion is based upon the sole ground that malice, oppression and willfulness on the part of the defendants are not sufficiently charged in the petition.

NAPTON and HOUGH, JJ., and SHERWOOD, C. J., concur in the views above expressed.

GALWAY V. SHIELDS.

(66 Mo. 312.)

Statute of frauds—action to recover money paid on contract void under.

An action will not lie to recover the consideration paid upon an oral agreement for the purchase of lands, if the vendor is willing to fulfill.*

ACTION for goods sold and delivered in pursuance of a verbal contract, by which payment therefor was to be made in certain real estate. A proper deed of the real estate had been tendered to plaintiff, but was refused. The plaintiff had judgment.

Gottschalk, for appellant.

* See *Galvin v. Prentiss*, 45 N. Y. 162; 6 Am. Rep. 58.

Finkelnburg & Rassieur, for respondents.

HOUGH, J. The only question presented by the record in this case is, whether a person who has paid money or property, upon a verbal contract for the purchase of lands, can maintain an action to recover back the money or the value of the property so paid, although the vendor of the land, to whom the money or property has been paid, is willing to execute the contract on his part.

This question was decided by the Court of Appeals in the affirmative. We do not controvert the doctrine on which that court founded its opinion, that the payment of the purchase-money is not such part performance as will take a verbal contract for the sale of lands out of the scope of the statute of frauds; that rule is now thoroughly established. But the relations of the parties in the case at bar are not such as to warrant the invocation of that rule. It will readily be conceded that if the plaintiffs here were seeking to enforce the parol contract against the defendant, the mere fact that he had paid the purchase-money would not entitle him to a decree for specific performance; and we do not understand the authorities cited by the learned judge who delivered the opinion of the Court of Appeals to go further than this. In cases like the present, however, a different rule prevails.

In *Coughlin v. Knowles*, 7 Metc. (Mass.) 57, it was held that "an oral contract for the sale of land is not utterly void; and therefore a party who advances money on such contract cannot recover it back if the other party is able and willing to fulfill the contract on his part." This decision was affirmed in *Wetherbee v. Potter*, 99 Mass. 361. In *Sims v. Hutchins*, 8 Smedes & Marsh. 331, Chief Justice SHARKEY said: "That the contract was not in writing may be good ground of defense, when specific performance of the contract is sought against the vendor, for whose benefit the statute was passed; but if the vendor is willing to perform, the price paid cannot be recovered back." To the same effect are *Shaw v. Shaw*, 6 Vt. 69; *Philbrook v. Belknap*, id. 383, and *Hawley v. Moody*, 24 id. 605.

In *Lane v. Shackford*, 5 N. H. 130, the opinion of the court on this subject was expressed in the following strong and emphatic language: "If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper

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foundation for an action, yet still common honesty and fair dealing require that he shall not be at liberty to refuse the land and demand money until the other party has refused to execute the contract." *Richards v. Allen*, 17 Me. 296, and *Bedinger v. Whittamore*, 2 J. J. Marsh. 563, announce the same doctrine in the most explicit terms.

In *Collier v. Coates*, 17 Barb. 473, JOHNSON, J., after citing a number of cases in support of the foregoing rule, said: "I doubt whether any well-considered case can be found in the courts of this country where the rule above laid down has been denied or even doubted."

Browne, in his treatise on the Statute of Frauds (ed. 1870), § 122, says: "The right in the vendee of land by verbal contract, to recover what money or other consideration he has paid, is clearly confined to those cases where the vendor has refused or become unable to carry out the contract, the plaintiff himself having faithfully performed or offered to perform on his part."

In the case of *McDonald v. Lynch*, 59 Mo. 350, it appeared that the plaintiff and the defendant agreed upon a sale and purchase of a lot in the city of St. Louis, at a price named, and plaintiff paid the defendant \$50 to bind the bargain. The parties differed as to what the contract was, as to a certain incumbrance on the land, and the plaintiff brought suit for the \$50 paid by him.

NAPTON, J., delivering the opinion of the court, said: "There is no doubt that, notwithstanding the Statute of Frauds, if the defendant offered to comply with the parol contract, the plaintiff had no right to recover the \$50 advanced."

In view of the foregoing authorities we cannot concur in the opinion of the Court of Appeals, and its judgment, and that of the Circuit Court, will, therefore, be reversed and the cause remanded.

The other judges concur, except SHERWOOD, C. J., absent.

Judgment reversed.

CONWAY V. REED.

(66 Mo. 346.)

Infant—liability for unintentional assault.

An infant is liable for his torts like an adult.

A charge of unlawful assault by shooting is sustained by proof of a shooting, and it is not necessary for the plaintiff to show an intention or negligence on the part of the defendant, but it is for the defendant to show an absence of such intention or negligence.*

ACTION for damages sustained by plaintiff in consequence of the alleged unlawful and wrongful shooting of him by the defendant. The answer set up, as a special defense, that the parties and other boys about their own age, twelve or thirteen years, were playing together, the defendant having a gun, and that without any fault, negligence, or design on the part of defendant, the gun, without being aimed at or directed toward the plaintiff, accidentally went off, and by accident shot respondent. On the trial, evidence was offered by defendant to show accident, and plaintiff to show negligence. Plaintiff had judgment.

The first instruction given by the court, at the instance of respondent, was as follows :

1. If the jury believe from the evidence that about the time charged in the petition the defendant shot the plaintiff in the leg with a shot gun, loaded with gunpowder and leaden shot, and which gun the defendant held in his hands, then, *prima facie*, the plaintiff is entitled to a verdict. And if the jury find for the plaintiff, they will assess his damages at such sum as they believe he has sustained, not exceeding ten thousand dollars.

The instructions asked by appellant, and which the court refused to give, are as follows :

1. That under the pleadings and evidence in this case, the plaintiff cannot recover.

3. Under the law and evidence in this case, the defendant, Reed, not only had the right to carry his gun along with him, but also had the right to carry it loaded ; and if the jury believe from the

*See *Peterson v. Hafner* (59 Ind. 120), 26 Am. Rep. 51, and note, 52.

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evidence that Conway was shot, without any intention on the part of defendant to shoot him, then the burden of proof is on Conway to prove to the satisfaction of the jury that such shooting resulted from the careless or negligent manner in which the defendant used said gun at the time.

6. That the defendant is charged in the petition to have been guilty of an unlawful and wrongful assault upon the person of plaintiff on or about the 11th day of April, 1874, and that plaintiff was injured thereby.

7. That every unlawful and wrongful assault upon the person of another includes some degree of malice or some intention, however slight, to do some injury to the person assaulted ; and unless the jury believe from the evidence that the defendant was prompted by some degree of malice, or had some intention to injure plaintiff at the time charged in the petition, they will find for the defendant.

Allen H. Vories, for appellant.

B. F. Loan and *Bennett Pike*, for respondent.

HENRY, J. An infant is liable for a tort in the same manner as an adult. *Bullock v. Babcock*, 3 Wend. 391; *Campbell v. Stakes*, 2 id. 138 ; *Vassee v. Smith*, 7 Cranch, 230 ; *Morgan v. Cox*, 22 Mo. 374.

It is contended by appellant that, because the petition alleged that defendant unlawfully and wrongfully assaulted the plaintiff and shot him with a gun, evidence of a negligent or careless shooting would not sustain the averment in the petition ; in other words, that the petition alleged one cause of action, and the evidence established another, if any. *Bullock v. Babcock, supra*, was an action of trespass for assault and battery. The defendant was a boy about twelve years of age, and the evidence showed a negligent shooting of plaintiff by defendant with an arrow from a bow, and it was held sufficient to entitle plaintiff to a judgment.

In *Morgan v. Cox*, defendant was an infant. The petition in that case alleged a negligent killing of plaintiff's slave by defendant, but there is no intimation in the opinion of the court that, if the petition had alleged, as in this case, that defendant unlawfully and wrongfully shot the slave, the evidence that it was the result of carelessness would not have established the cause of action stated

in the petition. LEONARD, J., said : "The facts of the present case would, under the former system of procedure, have supported an action of trespass, and cannot, we think, be distinguished from the cases cited. In one of them, the party, in uncocking his gun, accidentally discharged it and wounded a bystander. Here, the defendant accidentally struck the hammer of his gun against his saddle, and the same result ensued. In both cases it was upon the defendant to show that it happened, as the books say, by inevitable accident, and without the least fault, and the change that has been introduced by the new Code in the remedy has not changed the rules of law as to the liability of the parties." The change introduced by the new Code in the remedy did not go to the extent of requiring less or more material allegations in a petition than were necessary to constitute a cause of action at common law, but only obviated the necessity of using those formal and technical averments which, it had been held, were necessary, and for which no other mode of stating the same thing could be substituted. The change introduced, to which the very able judge, who delivered that opinion, alluded, was that made by the first section of the act of December, 1865, Revised Statutes of 1855, page 1216, which provided that there should be but one form of action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, to be denominated a civil action ; and in the third section of article 6, page 1229, requiring in a petition "a plain and concise statement of the facts constituting a cause of action, without any unnecessary repetition."

These sections have been retained in the subsequent revisions. Is it true, that proof of a negligent shooting does not sustain an averment of a wrongful and unlawful shooting ? With regard to the liability of the defendant, the law holds an injury inflicted through carelessness, as wrongful and unlawful ; if accidental and inevitable, no blame attaches to the person inflicting the injury. He is then, in no sense, culpable. If the act was lawful and right, which is the converse of the proposition, the party inflicting the injury through negligence could not be held liable, and is only responsible because it was unlawful and wrongful.

At common law the plaintiff was held to prove the cause of action alleged in his declaration, with as much strictness as under the Code, and yet an action of trespass for assault and battery, as we have seen, was the proper form of action for direct injuries neg-

ligently and carelessly inflicted, as well as for those that were intentional and malicious.

The celebrated case of *Scott v. Sheppard*, reported in 2 Wm. Black. 892, and cited and commented upon as often, perhaps, as any case in the books, was an action of trespass for assault and battery. *Weaver v. Wood*, Hobart, 134, cited by Judge LEONARD, was in the same form of action. There the defendant, a soldier, had accidentally shot his comrade while exercising. In all these cases, the plaintiffs maintained their actions, although the injuries received by them were proved to have been the result of accidents, and not intentionally committed. In none of them was it alleged in the declaration that the injury was occasioned by the negligence of the defendant. "In declarations in trespass, which lies only for wrongs immediate and committed with force, the injury is stated, without any inducement of the defendant's motive and intention, or of the circumstances under which the injury was committed." 1 Chitty's Pleading, 387, 127. The court properly overruled defendant's demurrer to the evidence.

The appellant complains of the first instruction given by the court at the instance of plaintiff, which declared that if defendant shot the plaintiff, then, *prima facie*, plaintiff was entitled to a verdict. "A battery is the actual infliction of violence on the person," and, in an action for assault and battery, Mr. Greenleaf says: "The plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault, for if the injury was unavoidable, and the conduct of defendant was free from blame, he will not be liable." 2 Greenl. on Ev. 81.

We do not understand by this that plaintiff must, in the first place by direct evidence, show either an intention to commit the injury, or that defendant was in fault. If the act was intentional, of course defendant would be liable, and proof of the shooting would make out a *prima facie* case of intentional shooting; and, when proof of the fact that defendant inflicted the injury is made, it devolves upon him to show that it occurred without fault upon his part, to exonerate himself, or that it was accidental, although occasioned by carelessness, to mitigate.

The case of *Wakeman v. Robinson*, 1 Bing. 213, cited by Prof. Greenleaf, as supporting the text, certainly does not sustain the proposition of the learned author, if by it is meant that the mere fact of the injury inflicted by defendant does not make out a *prima*

facie case, but that plaintiff must, in addition, prove in the first place that it was the result of carelessness on the part of defendant. The defense in that case was that defendant's horse being frightened by the near, noisy and rapid approach of a butcher's cart, became ungovernable, that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of defendant, he was not responsible for the consequences. The judge who presided at the trial held that this being an action of trespass, if the injury was occasioned by an immediate act of defendant, it was immaterial whether that act was willful or accidental. In the Common Pleas it was held that this was error, and that was the only question discussed by DALLAS, C. J., in his opinion. The learned author also cites 1st Comyn's Dig. 129, intending to cite 2d Comyn; we have found nothing there to sustain the doctrine announced by Prof. Greenleaf, if it is to be understood otherwise than as we have construed the language. Even in a trial for murder, from a proof of the killing with a deadly weapon the law implies an intent to kill, and then it is for the defendant to meet this presumption with evidence showing that it was unintentional, or justifiable, or excusable. "From the simple act of killing, the law will presume that it was murder in the second degree." WAGNER, J. *State v. Holme*, 54 Mo. 153.

In the *State v. Underwood*, 57 Mo. 49, the Circuit Court instructed the jury that if defendant killed Menifee with a gun loaded with powder and bullets, the law presumed the killing to have been intentional, and it was murder in the second degree, in the absence of proof to the contrary, etc., and this court held, WAGNER, J., delivering its opinion, that the instruction was unobjectionable. If such be the presumption in a prosecution for murder, it certainly will prevail in a civil action, for the law has a more tender regard for life and liberty than for property, and it could only prevail in criminal cases, because it is reasonable that it should. In *Morgan v. Cox*, 22 Mo. 374, already cited, LEONARD, J., said: "Under the old system of procedure it was no defense in such cases that the act occurred by misadventure and without the wrong-doer's intending it, but the defendant must have shown such circumstances as would make it appear to the court that the injury done to plaintiff was inevitable, and the defendant was not chargeable with any negligence."

Castle v. Duryee, 2 Keyes, 169. The defendant was the col-

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onel of the 7th regiment of New York State militia, and at the parade a part of the exercise was to fire with blank cartridges. He personally gave the order to fire, and Mrs. Castle, a spectator, was hit and wounded with a ball. DENIO, J., said: "These facts constitute the defendant *prima facie* a trespasser to the same extent as though the musket was fired by his own hand."

This action, as far as appears from the petition, is for an intentional trespass, and when the injury is proved to have been inflicted by defendant, and nothing more, the case is made out, and the defendant must prove that he was not chargeable with negligence as an exoneration, or that it was accidental and not intentional, although negligent, by way of mitigation. The doctrine is very clearly stated by the learned judge in *Morgan v. Cox*. There are cases in which plaintiff must prove that the party whom he sues for an injury inflicted was guilty of negligence, but in those cases the action can be sustained only by alleging in the petition and proving negligence. That the injury was negligently inflicted is the foundation of the action. "The burden of proof in an action upon negligence always rests upon the party charging it." Shearman & Redfield on Neg., p. 14, § 12. It was not charged in this petition, nor was it necessary to do so.

The rulings of the trial court are fully sustained by the authorities, and, with the concurrence of all the judges, the judgment is affirmed.

Judgment affirmed.

DYER V. BRANNOCK.

(66 Mo. 391.)

Marriage — requisites to valid contract of.

In the absence of statutory provision pronouncing such an agreement void, an agreement between parties to live together as husband and wife, followed by actual cohabitation, is valid, without any magisterial or clerical solemnization.*

EJECTMENT. The opinion states the case.

* See *Richard v. Drown* (73 Penn. St. 140, 13 Am. Rep. 736).

Pope and Randall, for plaintiff in error.

Cline, Jamison & Day, for respondents.

NAPTON, J. The two principal questions involved in this case are: First, whether the observance of the statutory forms prescribed for the celebration or solemnization of marriages, under our territorial government in 1819, or subsequently under the State government in 1830, was essential to a valid marriage; and second, the construction of our statutes of limitation, as applied to the facts in evidence.

In order to show the pertinency of the instructions to the evidence submitted, we will here state the main facts which that evidence tended to establish; whether to the satisfaction of the jury or not, it is not important to inquire.

The land in controversy is a part of the Motard tract, which passed at an early date to Culver Adams, and through him to his three children, David, James and Sarah Ann Adams, and upon a partition in 1838, the one-third which had belonged to Sarah Ann was set apart to the unknown heirs of Zachariah Wilson, from whom the plaintiff claims.

Zachariah Wilson was a river pilot in 1819, and one Mrs. Collins, a widow, at that time kept a boarding-house in St. Louis. There was evidence to show that Wilson and Jane Collins, the daughter of Mrs. Collins, and then about 19 years old, on the 24th of August, 1819, about 10 o'clock at night, declared their intention, in the presence of the mother and brothers of Jane, and several boarders who were present, to live together as husband and wife. There was no magistrate or other person authorized by the statutes of the Territory to celebrate marriage rites present on the occasion, but they stood up on the floor of the sitting-room, or most public room in the house, side by side, with joined hands, and it was announced to those present by the mother or brother of Jane, that she and Wilson had agreed to marry, to which they both assented by an inclination of the head. They then retired to a bed-room and cohabited together as man and wife for three weeks. When Major Long reached St. Louis on his expedition to the Rocky Mountains, Wilson joined the expedition. The result of this cohabitation was a daughter, named Cynthia Elizabeth, from whom plaintiff's title is derived.

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It was understood, on the departure of Wilson, that Mrs. Collins should take care of Jane, and that he would, when opportunity presented, remit some money to support her during his absence, which he occasionally did. Meanwhile, Mrs. Collins and her family removed to St. Charles, and were living there when Wilson returned to St. Louis in 1824. He was then married, in accordance with the forms provided for by the statute then in force, to Sarah Ann Adams, the owner of the property now in controversy. By this marriage a female child was born in 1826, who survived the mother, and died in 1827.

In 1830, after the death of Sarah Ann and her child, Wilson sent for Jane Collins, who was then in St. Charles, and he and Jane Collins afterward lived together as man and wife, until his death in 1836, recognizing her as his wife and treating the daughter, Cynthia Elizabeth, as his child. After the death of Wilson, Cynthia Elizabeth married Abner W. Dyer, and the plaintiffs are the descendants of that marriage. Mrs. Dyer died July 13th, 1869, and her husband died June 25th, 1870. This ejectment was brought August 11th, 1872.

The instructions of the court to the jury in regard to these connections of Wilson were as follows: "If you find from the evidence that in the year 1819, at the town of St. Louis, intending thereby to contract marriage, the said Wilson and one Jane Collins agreed to live together thenceforward as man and wife, and that of the union thus formed Cynthia Elizabeth Wilson was born, and that she survived the said Wilson, then the title to the premises sued for became vested in said Cynthia, etc. But if you believe from the evidence that when they came together in 1819 the said Wilson and the said Jane did not intend to contract marriage, but merely intended to live together for purposes of illicit cohabitation, and of that intercourse said Cynthia was born, then upon the death of her father she did not become vested with the title to the premises sued for, unless you find from the evidence that subsequently to the birth of said Cynthia, and after the death of said Sarah Ann Adams, he (Wilson) and the said Jane Collins, intending thereby to intermarry, mutually agreed to live together thenceforward as man and wife, and did so live, and that after such reunion the said Wilson recognized the said Cynthia as his child."

The statutes in regard to marriages, in force from 1819 to 1830, are as follows. The first act was passed by the governor and judges

of Indiana Territory, on April 24th, 1805. So much of it as is important to the consideration of the question involved here, is in these words:

"1. All male persons of the age of seventeen years, and female persons of the age of fourteen years, and not prohibited by the laws of God, may be joined in marriage.

"2. It shall be lawful for any of the judges of the general court or the county court of Common Pleas, in their respective districts, ministers of any religious society or congregation within the district in which they are settled, and the society of Christians called Quakers, in their public meetings, to join together as husband and wife all persons of the above description who may apply to them agreeably to the rules and usages of their respective societies to which the parties belong.

"3. Previously to persons being joined in marriage as aforesaid, the intention of the parties shall be made known by publishing the same for the space of fifteen days at least, either by the same being openly declared three several Sundays, holy days, or other days of public worship in the meeting, in the town where the parties respectively belong, or by publication in writing under the hand and seal of one of the judges before mentioned, or of a justice of the peace, within the district, to be affixed in some public place of the town where the parties respectively dwell, or a license shall be obtained of the governor under his hand and seal, authorizing the marriage of the parties without publication, as in this law before required."

An additional act was passed by the legislature of the Territory of Indiana, approved July 9, 1806, which in no way repeals or limits the foregoing law, except that the third section is as follows:

"Sec. 3. From and after the passage of this act, it shall be lawful for any preacher of the gospel, magistrate, or regularly ordained clergyman, to perform the ceremony of marriage within the Territory, to be certified and recorded, etc."

This remained the law of marriage in the Territory until after the admission of Missouri into the Union, and until the first revision of 1825, when it was repealed, and a different regulation adopted and approved on the 4th day of January, 1825, and to take effect on the 4th day of July, 1825. Revised Statutes of 1825, p. 527.

By the first section it is provided as follows: "Be it enacted by the general assembly of the State of Missouri, That every judge and justice of the peace of this State, and every stated and ordained minister and preacher of the gospel, shall be, and is authorized and empowered to perform the ceremony of marriage within this State, and all marriages heretofore solemnized by any of the said persons shall be deemed good and valid."

The remainder of the act provides for the mode of recording marriages, and creates the usual penalties for solemnizing marriage of infants, without consent of parents, etc. This law remained in force until the revision of 1835, when it was somewhat modified, and the act was commenced by the following section:

"1. Marriage is considered in law as a civil contract, to which the consent of the parties, capable in law of contracting, is essential."

The first question, presented by these instructions of the Circuit Court on the trial, was decided by this court in the case of *Cargile et al. v. Wood et al.*, 63 Mo. 501. In that case the following instructions were given by the Circuit Court: "The jury are instructed that marriage is a civil contract, and it is not necessary that the same shall be solemnized before a minister of the gospel, or an officer of law, and if you believe from the evidence, that at any time prior to the birth of the child Cynthia, Cargile and Cynthia Kilgore consented and agreed with each other to be husband and wife, and cohabited together as such husband and wife, then such facts constitute a lawful marriage, even though they or either of them supposed or believed that a solemnization before a minister or officer of the law was necessary to comply with the forms of the law, and no subsequent acts or declarations by them or either of them could in any wise annul such marriage; and although the jury may believe from the evidence that Augustus Cargile and Cynthia Kilgore had first become intimate in the State of Georgia, and although they were not then married to each other when such intimacy occurred, still if you believe from all the evidence in this case that said Augustus Cargile brought said Cynthia out to Missouri, on or about 1854, and that subsequently they cohabited together here as man and wife, and during such cohabitation treated each other as man and wife and were so reputed, had children which they treated as father and mother, and held them to be their children, that they thus lived and cohabited together until their death in 1862, and at such death had the child Catherine, then liv-

ing and about 8 or 12 months old, then the law presumes, and you have a right to infer that there had been a lawful marriage between them prior to the birth of said child, Catherine."

In the instructions given by the court, it is again asserted: "You are instructed that marriage is a civil contract, and in order to constitute a lawful marriage it is not necessary that the ceremony of marriage shall have been performed by a minister of the gospel or an officer authorized by law to perform such ceremony."

It will be perceived that these instructions, which were approved by this court, go further than the question involved in the present case requires to be considered, but the basis of all the propositions submitted to the jury was the assumption that under the law of this State a ceremonial marriage was not essential to its validity. Indeed, this proposition was not disputed on either side, and therefore was not discussed in the opinion of the court, but its correctness was essential to an affirmance of the judgment—for there was no pretense or shadow of proof in the case of any ceremonial marriage, at any time, and the marriage which the jury were authorized to presume was simply a marriage *per verba de presenti*, or *per verba de futuro* followed by cohabitation.

The United States District Court for this State, in the case of *Holabird v. Atlantic Insurance Co.*, 2 Dill. C. C. 166, appears to have adopted the same view of the law of this State. Judge TREAT, in his instructions to the jury in that case, says: "It is not necessary to the validity of a marriage in Missouri, that any special ceremony, religious or otherwise, should be performed, nor that the marriage should be solemnized before any person belonging to any one of the classes named in the Missouri statute, as authorized to perform the ceremony. Marriage in Missouri may be had by the mutual consent of two competent persons, made in good faith and followed by cohabitation, without the addition of any prescribed formalities, and may be shown by such evidence as proves that such a marriage actually exists. And such is substantially the law in Tennessee and Illinois. Therefore, if the jury believe from the evidence, that in the State of Missouri, Tennessee or Illinois, the plaintiff and Mr. Holabird agreed, by mutual consent, given in good faith, to become husband and wife, and cohabited as such thereafter, then from the date of such mutual consent, she was his wife."

In view of the importance of this question to the interests of

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society, and of the fact of a unanimous opinion of the Court of Appeals, directly in opposition to these views, it is proper that we should re-examine the authorities, both English and American, to see if the conclusion heretofore reached was arrived at hastily or inconsiderately.

The common law of England, in a modified form, was adopted by the Territorial legislature of Missouri in 1816. So also were the statutes of the British Parliament in aid of the same, made prior to the fourth year of James I, provided that neither said common law nor statutes were inconsistent with the laws of this Territory or with the Constitution and laws of the United States, and were not local to the Kingdom of Great Britain. In England, prior to the Council of Trent, marriage was regarded in no other light than as a civil contract, and the law treated it as it did all other contracts, allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, willing to contract, and secondly, able to contract, and lastly, actually did contract. Any contract made *per verba de præsenti*, or in words of the present tense, and in cases of cohabitation *per verba de futuro*, between persons able to contract, were, before the act of George II, deemed a valid marriage. 1 Bl. Com., ch. 15. In *Jesson v. Collins*, 2 Salk. 437, 447, Lord Chief Justice HOLT says that a contract *per verba de præsenti*, was a marriage, and in the same case, reported in 6 Modern, 155, he says that such a contract amounts to an actual marriage, as if it had been *in facie ecclesie*—and in this, all the court agreed. And in the *King v. Inhabitants of Brompton*, 10 East, 282, Lord ELLENBOROUGH, C. J., declares that before the marriage act the contract of marriage, *per verba de præsenti*, would have bound the parties.

It is true, that in the *Queen v. Millis*, 10 Clark & Finn. 682, it was maintained by the judges, that from the earliest times, long prior to the Council of Trent, the common law of England required to the constitution of a *full and complete marriage*, some religious solemnity; "that besides the civil contract, that is the contract *per verba de præsenti*, which has always remained the same, there has at all times been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variations of the laws of the church; with respect to which ceremony, it is to be observed, that whatever at any time has been held by the law of the church to be a sufficient religious

ceremony of marriage, the same has at all times satisfied the common law of England in that respect."

It is evident that the common law of England, as thus expounded, was not understood to be the common law introduced into this Territory in 1816, but rather as it was declared by Sir WM. BLACKSTONE, in the extract we have made from his Commentaries, and by Chancellor KENT in his Commentaries, Vol. 2, p. 86, when treating of the same subject: "No peculiar ceremonies," says the author, "are requisite *by the common law* to the valid celebration of the marriage. The consent of the parties is all that is required by natural or public law. The Roman lawyers strongly inculcated the doctrine that the very foundation and essence of the contract consisted in consent, freely given by parties competent to contract. *Nihil proderit signasse tabulas, si mentem matrimonii non fuisse constabit. Nuptias, non concubitus, sed consensus facit.* This is the language equally of the common and canon law, and of common reason. If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary, and which the parties (being competent as to age, and consent) cannot dissolve, and is equally binding as if made *facie ecclesiæ*."

In Reeve's Domestic Relations, p. 196, it is observed that "there is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that it should be solemnized in a church. Every idea of this kind, entertained by any person, has arisen wholly from the usurpation of the church of Rome on the rights of the civilian. She claimed the absolute control of marriages, on the ground that marriage was a sacrament, and belonged wholly to the management of the clergy. The solemnization of a marriage by a clergyman was a thing never heard of among primitive Christians, until Pope Innocent III ordered it otherwise. The only ceremony in practice among them was, for the man to go to the house where the woman dwelt, and, in the presence of witnesses, to lead her away to his own house. It is a pure civil transaction, to be solemnized in such a manner as the legislature shall direct, whether by a clergyman or any other person. * * I apprehend that by the provisions of the common law, marriages although celebrated by a person not qualified by law or in a manner forbidden

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by law, are valid. The conduct of the parties concerned has rendered them obnoxious to the penalties of the law ; but such singular conduct is not a ground for impeaching the validity of the marriage. Until the civil wars, during the reign of Car. I, nothing can be found on this subject. For until that period it had not been supposed that any person, but one in holy orders, could celebrate a marriage. The mode of pleading was *per presbyterum in sacris ordinibus constitutum*. After this period, and before the statute of George II, several cases may be found which will cast light on this subject. During the Commonwealth, the power of celebrating marriages was given to justices of the peace, and they were the only officers whom the law recognized as possessing authority to marry. Yet, during the existence of this law it was determined that a marriage celebrated by one in holy orders, though not a justice of the peace, was valid. After the restoration the power of celebrating marriages was committed exclusively to the clergy of the church of England. And yet we find the Court of King's Bench issuing a prohibition to the spiritual court, because the validity of a marriage had in the face of a separate congregation, was questioned in said court. So, too, we find that a marriage by a preacher in a separate congregation, who was a layman, was recognized as valid; for, on the death of the husband, the wife and children were admitted to their distributive shares. * * * We find, also, that a marriage by a popish priest was held valid ; and that in the strongest possible case the case was that a man had been married by a popish priest, who, by law, had no authority to marry."

Mr. Greenleaf, in his treatise on Evidence, Vol. II, p. 531, says: "Marriage is a civil contract, *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law. If the contract is made *per verba de præsenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary. And though in most, if not in all, the United States, there are statutes regulating the celebration of marriage, and inflicting penalties on all who disobey the regulations, yet it is generally considered that in the absence of any positive statute declaring that all marriages not celebrated in the prescribed manner shall be absolutely void, or that none but certain magistrates or ministers

shall solemnize a marriage, any marriage regularly made according to the common law, without observing the statutory regulations, would still be a valid marriage."

Mr. Bishop, in his treatise on Marriage and Divorce, declares that "the doctrine has become established that a marriage, good at the common law, is good, notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity. This rule applies not only to the statute as a whole, but to the several parts of it; so that, if it declares the marriage void for non-compliance with a particular provision, it is good notwithstanding a failure to comply with any other provision. This rule, like most other rules now well settled, has struggled against some doubts and uncertainties, but it seems never (unless we except a Massachusetts decision, to which we shall presently refer) to have been discarded in actual adjudication." The exceptional case referred to is, *Milford v. Worcester*, 7 Mass. 48. Passing from the text-books, we proceed to refer to a few of the leading decisions in this country, referred to by Mr. Bishop, as supporting the position stated in the above quotation.

In the case of *Ferrie v. The Public Administrator*, 3 Bradf. 151, in the Surrogate Court in New York, a case elaborately discussed by eminent counsel, the learned surrogate declared the following doctrine as the basis of his decision: "Marriage, in its origin, is a contract of natural law, and in civil society is a civil contract, requiring no form of ceremony, unless imposed by the local law, and hence, when the law directs the ceremony to be conducted in a prescribed manner, a failure to comply with such forms does not affect the validity of the contract, *unless such effect be expressly declared by statute*." This case was decided in 1855.

In *Dumaresly v. Fishly*, 3 A. K. Marsh. 370, decided in 1821, BOYLE, C. J., said: "Marriage is nothing but a contract; and to render it valid, it is only necessary, upon the principles of natural law, that the parties should be able to contract, willing to contract, and should actually contract. A marriage thus made, without ceremony, was, according to the simplicity of the ancient common law, deemed valid to all purposes; and such continued to be the law of England until the time of Pope Innocent III, when the ceremony of celebrating marriage *in facie ecclesie* was first introduced into that country."

Judge MILLS dissented in the case — but upon the ground that

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the common law of England was only adopted in Kentucky so far as it was compatible with the spirit of our government; and that the subjection of the English common-law judges to the usurpations of ecclesiastical judicatures induced the doctrine that words alone, without cohabitation, constituted marriage. Thereupon, Judge MILLS says: "I would say that a marriage executed according to the forms of law should be binding at all events, and that those made in other modes should require consummation, evidenced by cohabitation; while those that exist in bare words, and which had the offer of consummation on one side and a refusal on the other, I would leave the *locus pœnitentia* to the party rejected."

In *Hutchins v. Kimmell*, 31 Mich. 127, decided in 1875, Judge COOLEY declares it to be the law of Michigan that where parties agree presently to take each other for husband and wife, whatever the form of ceremony, or if all ceremony be dispensed with, and from that time live together professedly in that relation, this constitutes a valid marriage. And the judge adds: "This has become the settled doctrine of the American courts; the few cases of dissent, or apparent dissent, being borne down by a great weight of authority in favor of the rule as we have stated it." And the judge cites cases in New York, Pennsylvania, New Jersey, Vermont, Ohio, North Carolina, New Hampshire, Tennessee, Maryland, Alabama, Kentucky, California and Louisiana, in support of this position.

The case of *Londonderry v. Chester*, 2 N. H. 268, was decided in 1820. In that case, C. J. WOODBURY says: "The form of the contract of marriage, as a mere civil transaction, is well enough established. Thus, if it be *per verba in futuro*, the contract is executory, and if not afterward executed, an action lies for damages alone, though formerly this kind of a contract was specifically enforced by ecclesiastical courts, and its existence was considered a good cause of a divorce. But if the contract be *per verba de presenti*, the marriage is complete; and if the parties, being in other respects competent to contract, and not being influenced by fraud or force, employ such words, they become, by the operation of the contract alone, husband and wife, and are liable to the duties of their new relation." And Judge WOODBURY adds: "Under this view, the purity and sacredness of the marriage contract will remain no less, but rather more inviolate, than under a different

construction. For now the contract will never be annulled for any accidental or designed irregularity, not extending to the essential grounds of the contract. And it is a matter of deep concern to the public, that when a contract which changes so thoroughly the relations of the parties to the community is first executed by them with deliberation and afterward consummated by cohabitation, it should not be lightly dissolved, and every thing done under it annulled."

Pearson v. Howey, 6 Halst. (N. J.) 17, was decided in 1829. In that case Judge FORD says: "The parties thus joined together were not related within any prohibited degree, nor under any disability for want of age or understanding. They were free, able and willing, as it respected themselves, and they contracted marriage in words of the present tense, taking each other as husband and wife. I consider it to have been long and fully settled in law that such is a valid marriage. It is a maxim of the common law, as ancient as the law itself, that *consensus non concubitus facit nuptias*. It is the contract makes the marriage. Such, also, has always been the law or maxim of the church in all ages, as well as the common law. Courts of justice are not authorized to alter the law, without legislative authority in any case, and most assuredly not in the case of such universal importance." Judge FORD proceeds to cite authorities from the ancient English adjudications, and then proceeds: "It was never held essential to the validity of the contract that it should be made in a particular place or in the presence of one person more than another, provided it could be sufficiently proved." * * "The common law requires nothing more of parties who are under no legal disability, than proof of a contract, made in words of the present time." * * "But though the common law requires nothing more than a contract, still the proof of it is indispensably necessary, because if it cannot be proved it is the same as none, and will be treated as none, from whence arises the heavy obligation which parties lie under to themselves of solemnizing it before one or more competent and credible witnesses, such as parents, relations, friends or neighbors. * * But though the common law requires proof of the contract of marriage, it does not specify who shall be the witnesses, any more than who shall be in case of a will, a deed or a bond. * * W. H. was as competent to prove it as a magistrate, a clergyman, or religious society, according to the most established principles of

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the common law, which the Constitution of this State makes the common law of the land, except so far as it may be repealed or altered from time to time by the legislature. The question then is, whether the legislature has ever repealed or altered the law of marriage. Now our whole statute book shows but one act concerning marriages, which is to be found in Rev. Laws, 181, and it enacts 'that every justice of the peace of this State,' every 'stated and ordained minister of the gospel,' and 'every religious society according to its rule,' shall be empowered to solemnize marriages. This law *does not prohibit other persons* from solemnizing them, as they always had a right to do before the law was enacted.

It contains no express words of prohibition nor any implication to that effect. To solemnize means nothing more than to be present at a marriage contract, in order that it may have due publication, before a third person or persons, for the sake of notoriety and the certainty of its being made. To solemnize or celebrate means nothing more, and may be done before parents, friends or strangers, able to testify to the fact; but where there is only one witness, who may die at any moment, the parties incur an awful risk of losing the only evidence of the marriage, and thereby of bastardizing their innocent offspring, and of losing the great marital rights of protection and property. But in point of mere legal competency for witnessing or solemnizing a contract of marriage, the law has made no distinction of persons. Thus, justices of the peace, ministers of the gospel, religious societies, not only had the power like all other persons to witness and solemnize marriages, but they actually exercised this power, long before the present act was passed, which proves that they always had the right to do it at common law, and as this act gave them no new power so it took none away. But suppose this act had gone to the whole extent of declaring that no other person or persons should solemnize marriages, except those mentioned in it, such other persons would commit an offense against the act by solemnizing marriages, for which they might be punished, but still the marriage contract between the parties themselves would remain valid. During the Commonwealth of England, Parliament passed a law requiring all marriages to be solemnized by a justice of the peace, yet a marriage solemnized as before a clergyman was holden by all their courts to be valid, between the parties, though the clergyman was punishable. So the solemnization of marriage in England, before a popish priest, was

always helden valid, as between the parties, though the statute prohibited such priest from doing it, and for the act he was exposed to punishment. See the cases collected on this subject in Reeves' Dom. Rel. 198. Our act empowers an ordained minister of the gospel to solemnize marriages ; but suppose a minister of the gospel should do it before he is ordained, can any person believe that the marriage itself would be invalid, and that either of the parties might go away and any time afterward contract new alliances ? Our statute prohibits ministers of the gospel from solemnizing the marriage of persons under age, without the consent of parents or guardians, under a heavy penalty; but this does not render the marriage void ; on the contrary, it remains sacred and inviolable, and is the very thing that aggravates the offense. What, then, it may be asked, was the public use of the act in question, if justices of the peace, clergymen and religious societies had power to solemnize marriages as well before the passing of it as since ? I answer, that they were the persons who had been resorted to by almost all classes of society, as if by universal custom, to be witnesses of this solemnity, on account of the gravity and respectability of their characters, and one of the uses of this invaluable statute was, to compel them to make a record of all these marriages by certifying them into the clerk's office of the county, there to remain of record to future times, to effect the most public as well as private interests. * * The withering effects of declaring a marriage null and void, from the beginning have been sufficient to appall, not courts of justice only, but courts of the church, in all ages, where the parties had taken each other as husband and wife, by words of solemn contract in the present tense, in the presence of credible witness or witnesses, and the contract could be fully proved. The British Parliament have lately repealed their old common law, by prescribing the manner in which marriage shall be solemnized, and adding an express clause that marriage in any other form shall be void, but it is obnoxious to the country, to the wisest and best and most virtuous men among them, as well, it would seem, as to their courts of justice, and it is yet a problem whether they will not connive at the evasion of it."

It will be observed that the above was the opinion of Judge FORD alone, the other judges not expressing any dissent thereto, but declining to express any opinion, except upon the precise point involved in the case, which was the validity of a marriage sol-

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enuized by a justice of the peace, outside of his territorial jurisdiction. But I have copied largely from Judge FEAD's opinion, because it is frequently referred to with approbation, not only in text-books, but in subsequent adjudications, as an able discussion of the subject.

The case of *Rodebaugh v. Sanks*, 2 Watts, 11, was decided in 1833. GIBSON, C. J., in that case, observes: "Many provisions in the act of 1700 and 1729, though doubtless wholesome when they were enacted, are ill-adapted to the habits and customs of society as they now exist. It is not too much to say, that a rigid execution of them would bastardize a vast majority of the children which have been born in the State for half a century, for if the clause which requires that 'all marriages' shall be solemnized by taking each other to husband and wife before 'twelve witnesses,' were taken according to its natural import for a declaration of what shall be a legal marriage and what not, it would follow that a marriage contracted in any other form or way is void. To escape from a conclusion imputative of guilt to the parties and destructive of the civil rights of their offspring, it is necessary to hold not only this clause, but those which require a certificate of marriage under the hands of the parties and the twelve witnesses, to be registered in the proper office, as well as publication of banns by posting on the church or court-house doors, with other matters fallen into disuse, to be but directory."

In 1845, in the Court of Quarter Sessions at Philadelphia (*Nathan's Case*, 2 Brewster, 149), Judge PARSONS says: "It seems to be clearly settled in the United States, that marriage is but a civil contract, and it is not necessary that a clergyman or magistrate should be present to give validity to the marriage; and if the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and is followed by consummation, it amounts to a valid marriage, which the parties, being competent as to age and consent, cannot dissolve, and is equally binding as if made *in facie ecclesiæ*. The question has been very fully considered by the Supreme Court of this State, and held to be the law here, that marriage is a civil contract, which may be completed by any words in the present tense, without regard to form, nor is it absolutely necessary to be done before a clergyman or a magistrate."

In *Richard v. Brehm*, 23 P. F. Smith, 140, decided by the

Supreme Court of Pennsylvania in 1873, MERCUR, J., observed: "Marriage is a civil contract, *jure gentium*, to the validity of which the consent of parties, able to contract, is all that is required by natural or public law. If the contract is made *per verba de presenti*, though it is not consummated by cohabitation, or if it be made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage, in the absence of all civil regulations to the contrary. The fact of marriage may be proved by competent and satisfactory evidence. * * Marriage is in law a civil contract, not requiring any particular form of solemnization before officers of church or State."

The case of *Bissel v. Bissel*, 55 Barb. 326, was decided in 1869. It is there said: "It is well settled that no religious ceremony, or form of any description, is essential to the validity of marriage. All that is requisite is that the parties should be capable of contracting, and that they should actually contract to be husband and wife. A mere agreement to marry at some future time, followed by cohabitation, will not constitute a marriage, but an agreement, made in the present tense, whereby the parties assume toward each other the marital relation, is an actual marriage. This agreement may be written or verbal, with or without witnesses, and may be proved like any other contract; when proved to the satisfaction of a court of justice, it constitutes a lawful marriage."

The case of *Newbury v. Brunswick*, 2 Vt. 159, was decided in 1829. PADDOCK, J., delivered the opinion of the court, a part of which is as follows: "To marry is one of the rights of human nature, instituted in a state of innocence for the protection thereof, and was ordained by the great Lawgiver of the universe, and not to be prohibited by man. Yet human forms and regulations are necessary for the safety and security of the community; but those forms and regulations are to be within the reach of every person wishing to use them; and if they are not, other forms and customs will be substituted; and such was the case in this instance. Before the days of Pope Innocent III solemnization of marriages in churches was not known. After the agreement to cohabit, the man led the woman to his habitation, which was all the ceremony then in use. * * * It must, however, be admitted that great convenience is experienced from the celebration of marriages before constituted authorities, for it not only furnishes proof of the best description, but the preservation of it is directed by statute, and easily attained

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when needed. But the law, treating the marriage agreement of the parties as the marriage, regulating only the manner and form of celebrating it and preserving the evidence thereof, admits proof other than the copy of the registry or record of the magistrate or witnesses — the declaration of the man or woman, the continued understanding of friends, and cohabitation as evidence of the fact — and as neither our statute (nor that of 26 George II) declares that marriage was void which was not consummated according to the provisions of them, no sound reason can be offered why the covenants and agreements of marriage between H. and P. *per verba de præsenti*, followed by cohabitation, should not be deemed as valid, to every intent, as though made before the altar, specially as it is viewed, both in this State and in England, in no other light than as a civil contract."

The case of *Holmes v. Holmes*, 6 La. (O. S.) 463, was decided in 1833. In that case, Judge BULLARD says: "Marriage is regarded by our law in no other light than as a civil contract, highly favored and depending essentially on the free consent of the parties capable by law of contracting. Our Code does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of the marriage. These laws relating to forms and ceremonies, here regarded as directory to those alone who are authorized to celebrate marriages, are intended to guard against hasty and inconsiderate marriages in defiance of parental authority. Like all other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party."

The case of *Campbell's Admr. v. Gullatt*, 43 Ala. 57, was decided in 1869. The Alabama statute resembled the Missouri statute, except that it declared positively "that no marriage shall be solemnized without a license issued by the judge of probate of the county where the female resides;" yet the court held in that case as follows: "Such laws do not declare marriages, not solemnized in accordance with their provisions, invalid. We, therefore, do not feel authorized to do what the laws themselves have not done, but we hold that in this State, a marriage not celebrated in conformity with the said laws on marriages, that is, celebrated without a license issued by a judge of probate or not by any one of the persons or religious societies named in such law, or without comply-

ing with other provisions of said law, is not to be declared invalid, provided the requirements of the common law have been substantially complied with ; in other words, that a marriage good at the common law is a valid marriage in this State." In *Hargroves, Admr. v. Thompson*, 31 Miss. 211, decided in 1856, HARDY, J., observed : "There is nothing in the statutes of Mississippi directly rendering marriages, conducted without the observance of the rule therein prescribed, illegal and void, and the rule which has been sanctioned in reference to marriages not solemnized according to statutory regulations is, that even prohibitory words in a marriage act will not authorize an inference of the nullity of the marriage, unless the nullity is declared by the act ; and although persons who may violate the forms required by the statutes in solemnizing marriages, may be liable to the penalties provided for the non-compliance, yet marriages contracted without a conformity to such regulations are generally held to be valid, if made between parties capable by the common law of contracting them, unless the statutes positively declare that marriage, not conducted in conformity with their provisions, shall be void. We think this is the proper construction to be given to our statutes on this subject, which appear to be similar in their provisions to the statutes of other States in which this construction has been adopted."

In *Carmichael v. The State*, 12 Ohio St. 553, it was held that where parties openly and mutually covenanted to a contract of present marriage—then to become husband and wife—and thereafter cohabited as such, it was a legal marriage, and the man was liable to prosecution for bigamy, if he had been married before and his wife was still living.

In *Graham v. Bennet*, 2 Cal. 503, decided in 1852, the same doctrine is asserted. In Tennessee (see *Bashaw v. The State*, 1 Yerg. 183) the statute required a publication of banns or a license from under the hand and seal of the governor, and enacted "that all marriages solemnized as aforesaid, without such license first had, shall be and are hereby declared illegal and void." And the court held, PLOCK, J., dissenting, that a marriage celebrated without a license or without publication of banns was void. This act was passed in 1766, and before the separation from North Carolina. Hence, the decision in North Carolina in 6 Ired. 23, *State v. Robbins*. So that, as far as I have been able to discover, the only decision in the United States conflicting with the general doctrine

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stated by Mr. Bishop, is the case in 7th Massachusetts Reports, heretofore referred to.

These extracts are probably sufficient to show the general current of American authority, and would seem to justify our conclusion, *stare super antiquas vias*. Our statutes are essentially like those of the States from whose courts opinions have been quoted, and in some respects less stringent than many others. There is, at all events, no positive declaration in our statute that a marriage not celebrated or solemnized before a magistrate or minister of the gospel shall be void. It will not be understood that we assent to all the positions assumed by those judges and writers from whom we have quoted; we merely conclude from these authorities, as well as upon general principles and public policy, that the instructions of the circuit judge were correct. Nothing is said in these instructions as to the efficacy of a promise to marry at some future time; nothing is declared as to the value of a promise *in verba de prææenti*, unless followed by cohabitation, and unless the parties intended a present marriage. If an affirmative response was given by the jury to the question propounded by the court, there was a contract of present marriage — openly made before the mother and brothers of the woman, and several strangers to the family — followed by cohabitation as husband and wife. That the husband, in pursuing his avocation, determined to join Major Long's exploration party to the Rocky Mountains, could hardly be regarded as a very strong proof of predetermined bad faith, nor his subsequent marriage, five years afterward. These were matters, however, for the jury to pass on. The jury were required to find that the parties contemplated no further ceremony to completely constitute the conjugal relation between them, and that they, at the time they stood up with joined hands, on the floor of Mrs. Collins' boarding-house, intended to become and believed that they had become husband and wife.

We will not be understood as giving any opinion in regard to a contract of marriage *in verba de futuro*, followed by cohabitation, since the facts in the present case require none on that question. 10 Ohio St. 181.

[Omitting a minor point.]

The judgment of the Court of Appeals is reversed and the case remanded to the Circuit Court. The other judges concur.

Judgment reversed.

PHELPS V. MCNEELY.

(96 Mo. 554.)

Partnership — assumption by one partner of debts and pledge of property for his own debt.

A partner in an insolvent firm sold his interest to his copartner, who assumed the firm debts. The latter deeded all the firm property to secure a debt of his own accruing previous to the dissolution. *Held*, that a creditor of the firm was entitled to payment out of such property before the individual creditor, and as to the firm creditor such deed was void.

PROCEEDINGS to determine right to personal property. The opinion states the facts.

J. D. Strong, for appellant, cited *Caldwell v. Scott*, 54 N. H. 414; *Tenney v. Johnson*, 43 id. 144; *Rogers v. Batchelor*, 12 Pet. 230; *Sauntry v. Dunlap*, 12 Wis. 364; *Conroy v. Woods*, 13 Cal. 631; Story on Partnership, 97; *Taft v. Buffum*, 14 Pick. 322; *Clark v. Houghton*, 12 Gray, 38; *Pierce v. Wilson*, 2 Iowa, 20.

S. E. Carter, for respondent.

NORTON, J. The appellant in this case brought his suit by attachment against the firm of Clark & Bowers, in the Buchanan Court of Common Pleas. The attachment was levied upon certain goods and chattels, as the property of the firm. The respondent, Phelps, appeared and filed an interplea in which he claimed a portion of the property thus levied upon, under a deed of trust executed by Clark, to secure the payment of a debt which Clark owed one Cooper. The answer to this denied the right of Phelps to the property, or that Clark owed Cooper, or had ever executed a note, and alleged that the deed of trust was without consideration, was fraudulent, and was made to hinder and delay the creditors of Clark & Bowers. The venue of the cause was changed to the Andrew Circuit Court, where, upon a trial, judgment was rendered in favor of plaintiff, Phelps, from which the defendant has appealed to this court, motions for new trial and in arrest of judgment having been overruled. The defendant seeks a reversal of the judgment because of the alleged errors of the court in receiving and re-

jecting evidence, and in giving and refusing instructions. The objection made to the reception in evidence of the deed of trust, and the return of the sheriff showing what property had been seized by him by virtue of the attachment writ, are too frivolous and technical to require further notice, than to say that they were properly overruled. Defendant offered to prove the contents and appearance of a memorandum book which had been produced by Cooper on a former trial. This was objected to on the ground that the book itself was the best evidence, and until its absence or loss, if lost, was accounted for, the evidence offered was but secondary. The court ruled properly in excluding this evidence, defendant not having laid the proper foundation for its introduction. Besides this, witnesses Grubb and Strong were allowed to state what Cooper had testified to in regard to it at a former trial of the cause, Cooper having been previously asked what he had sworn to concerning it on said trial.

The evidence in the case shows that prior to the 14th of March, 1871, Clark and Bowers were partners in conducting a saloon in St. Joseph, and that they were indebted on partnership account to defendant McNeely in the sum of \$387.10. On that day Bowers sold to Clark his interest in the partnership business and property on the following terms, viz.: Clark was to pay Bowers the sum of \$125, and pay all the partnership debts, the principal one of which was the debt due to McNeely. The evidence strongly tends to show that it was understood at the time, and previous to the consummation of the bargain between Clark & Bowers, that Clark was to execute a mortgage on the property to secure McNeely's debt, and that McNeely was, in that event, to release Bowers and look to Clark for his debt; that Clark on the same day, and prior to the consummation of the agreement between Clark & Bowers, had told McNeely that Bowers would not sell to him unless he, McNeely, would release Bowers, and promised to execute to McNeely a mortgage if he would release Bowers, and that McNeely agreed to do this when the mortgage should be executed; that on the 14th of March, 1871, Bowers executed and delivered a writing to Clark which recited the dissolution, and the fact that he had sold his interest to Clark for the consideration of \$125, and the further consideration that he should pay the partnership debts. The evidence also tends to show that at the time this agreement was made Clark was indebted to Cooper in the sum of about \$600 as his own

individual private debt; that a portion of this debt was for money loaned by Clark to enable him to buy Bowers' interest in the firm, and \$83 of it was applied to the payment of rent then due by the firm, and for which McNeely was bound as security. Clark swears that he told McNeely he had borrowed this money of Cooper, and McNeely testifies to the contrary, and that Clark told him he had borrowed the money of one Gill. The evidence shows that Clark & Bowers were at that time, and still are, insolvent, and that Clark did not execute a mortgage to McNeely; that on the 16th of March, 1871, two days after the dissolution, Clark executed to Phelps, the plaintiff, a deed of trust on the partnership property, for the purpose of securing Clark's individual debt of \$600 to Cooper; that Cooper had, about one week prior to the dissolution, applied to Clark and requested him to execute a mortgage to secure his debt.

The chief error complained of, and brought to our attention, was the refusal of the court to give the following instruction: "If the jury believe, from the evidence, that on or about the 14th day of March, 1871, defendants Clark & Bowers (in the attachment suit) were copartners in business, and as such copartners were the owners of the property in controversy herein, and that at the time they were insolvent, and had no other property or assets with which to pay their firm debts; that said Clark & Bowers were at the time, as such partners, indebted to said J. D. McNeely in about the sum of \$387.10, and that with the knowledge of these facts, Clark purchased of Bowers his interest in the partnership effects for the purpose of enabling the said Clark to transfer said partnership property to interpleader, Phelps, to secure the payment of an individual debt due from Clark to Cooper, and that, in pursuance of such purpose on the part of Clark, the deed of trust read in evidence was executed to secure the debt due from Clark to Cooper, then such transfer from Clark to Phelps was fraudulent and void as to said McNeely, and the jury will find for defendant in the interplea." It was held in the case of *Flanagan v. Alexander*, 50 Mo. 50, that one partner has no authority or power whatever, without the consent of his copartners, to appropriate the assets of the partnership to the payment of his individual indebtedness. While a partner can dispose of the property by a *bona fide* sale, he cannot appropriate it, without the consent of his copartners, to the payment of his individual debts, either with or without knowledge of the creditor that such property was partnership property. *Ackley*

v. *Stachlin*, 56 Mo. 561. In the distribution of partnership assets, partnership creditors have a preference over individual creditors, and individual creditors have a corresponding preference in reference to individual property. It is, however, argued that, inasmuch as Bowers had sold out to Clark with the condition that Clark was to pay the partnership liabilities, the partnership property thus received by him was released from the operation of this rule. It must be conceded that, if Clark, prior to his purchase of Bowers, had executed the deed of trust in question on the partnership property to secure the payment of his own debt to Cooper, without the consent of Bowers, he would have taken no interest therein by virtue thereof, except what might have remained over to Clark after the payment of all the firm liabilities as his share. The mere fact that the partnership was dissolved, and that Bowers retired from the firm after selling his interest to Clark on the condition that he was to pay partnership debts, would not authorize Clark to apply the property thus acquired to the payment of his individual antecedently contracted debt to the exclusion of the firm creditors; and their right to be first paid out of the assets to the exclusion of individual creditors, would not be impaired any more by an application of the firm assets after its dissolution under the above circumstances, by one partner to the payment of his own debt, than if such application had been made before the dissolution. The question here raised is thoroughly discussed in 43 N. H. 144, *Tenney v. Johnson*, in which the court, after stating that it was settled that the effects of the firm in the hands of a surviving partner remained subject to the prior claim of partnership creditors as against creditors of the surviving partner, speaking through Justice BELLOWS, say: "The question then arises, if one of the partners voluntarily retires from the firm, releases all his interest, and receives from the remaining partner an obligation to pay all its debts, does the right of priority still continue in the partnership in respect to such assets, or in other words, is there no substantial difference between such a case and that of surviving partners? In both cases the legal title to the assets is vested in the remaining partner, in one by operation of law, and in the other by the act of the parties, and in either case the remaining partner has the full power of sale for proper purposes. So in both cases he is bound to pay all the company debts, and so far as the creditors are concerned by the same obligation, namely, by his

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partnership promise. If it be held that this right of priority may be defeated by a sale from one partner to another, it is easy to see that it would be a most convenient mode of evading a principle that is held to be salutary." Each partner has a right to have the partnership property applied to the due discharge and payment of all firm debts and liabilities, before any one of the partners or his individual creditors can claim any right or title to them. Hence, it follows that no separate creditor of any partner can acquire any right, title or interest in the partnership stock, funds or effects by process or otherwise, merely in his character as such creditor, except for so much as belongs to that partner as his share or balance after all prior claims thereon are deducted and satisfied. Story on Part. 156, § 97. The contention in this case is between a creditor of the firm of Clark & Bowers, and the individual creditor of Clark, one of its members, who is seeking to have the partnership property applied to the payment of his debt. Unless the consent of McNeely, the firm creditor, to this application can be shown, this cannot be done. We think the instruction asked should have been given, and because it was refused, the judgment will be reversed and cause remanded, in which the other judges concur.

Judgment reversed.

AMERICAN UNION EXPRESS CO. V. CITY OF ST. JOSEPH.

(66 Mo. 675.)

Constitutional law — municipal power of taxation.

A city was authorized by its charter to license, tax, and regulate merchants, express companies, agents, insurance companies, etc. Under this power it imposed an *ad valorem* tax on the gross annual receipts of an express company derived from its business done in the city. The business of the company consisted in receiving goods for transmission to points outside the State, to which its own line did not extend. *Held*, (1) that the power conferred was valid under the State constitutional provision enjoining a uniform rule of taxation; (2) that it was not in conflict with the provision of the Federal Constitution granting to Congress the exclusive power to regulate commerce among the several States; (3) that its exercise was valid, although the tax was different from that imposed on merchants.*

* See *State v. Philadelphia, etc., R. R. Co.*, 45 Md. 361; 24 Am. Rep. 511; *Weber v. Reinhard*, 73 Penn. St. 370; 13 Am. Rep. 747; *Wheeling, etc., Transportation Co. v. City of Wheeling*, post.

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ACTION to recover paid taxes. The opinion states the facts.

Allen H. Vories, for appellant, cited 1 Dillon on Mun. Corp., §§ 291-293; 2 id., §§ 606-610; Cooley on Tax. 408-413; *State Freight Tax Case*, 15 Wall. 232.

Benjamin R. Vineyard, for respondent.

NORRIS, J. This suit was instituted in the Circuit Court of Buchanan county to recover back a part of the taxes paid by plaintiff for the years 1872 and 1873. It is alleged that the taxes were paid by plaintiff under protest, and because defendant, through its collector, threatened to seize and sell the property of the plaintiff to pay the same. The petition alleges that, during the years 1872 and 1873, the plaintiff only had at any one time \$2,500 worth of property, and yet plaintiff's taxes for the year 1872, as assessed, amounted to \$180.97, and for the year 1873, to \$206.75, although the tax levy was only two per cent. It is alleged that this tax was illegally assessed, under an ordinance of said city requiring express companies to pay an *ad valorem* tax equal to that which is levied upon real estate within the limits of said city, for general and special purposes, upon the gross amount of all moneys which, during the year ending on the first day of January, shall have been received by such company, as a compensation for the transaction of such express business; that under said ordinance plaintiff was required, on the first day of January of each year, to take out a license, and to pay therefor, the amount assessed under said ordinance as an *ad valorem* tax; that, in consequence thereof, plaintiff has been forced to pay more than its due share of the municipal taxes for the years 1872 and 1873, and asks judgment for the recovery of the taxes so paid. The answer contained a denial of each and every allegation of the petition. Upon the trial, after the introduction of plaintiff's evidence, the court instructed the jury that on the evidence plaintiff was not entitled to recover. Whereupon a nonsuit was taken, with leave, and a motion to set the same aside, and for new trial being overruled, the plaintiff brings the case here by appeal. On the trial plaintiff offered in evidence a provision from defendant's charter, empowering it "to license, tax and regulate wholesale merchants, agents, express companies or their agencies, insurance companies or their agencies, telegraph

companies or their agencies, land agents and real estate brokers," also, an ordinance entitled "merchants," to the effect that merchants shall, on the first day of January of each year, take out a license and pay an *ad valorem* tax, equal to that which is annually levied upon real estate within the limits of the city, on the actual cash value of all goods, wares and merchandise which they may have in their possession or under their control, whether owned or consigned to them for sale, on the first day of January in each year; also, another ordinance, entitled "express companies," to the effect "that every express company or agency thereof, doing an express business in the city, shall pay an *ad valorem* tax equal to that which is levied upon real estate within the limits of the city, for general and special purposes, upon the gross amount of all moneys which, during the year ending on the first day of January, shall have been received by such company or agency in said city, as a compensation for the transaction of such express business." Other evidence was introduced, showing that the city collector had the authority to seize and sell property after demand and refusal to pay the tax; also, evidence tending to show that plaintiff had paid the tax in question under protest, after its payment had been demanded by the collector.

It is argued by counsel for plaintiff that the court erred in giving the instruction that, under the evidence, plaintiff could not recover, because defendant, by virtue of the authority given in the charter, had no constitutional power to provide one mode of taxation for merchants and another and different mode for express companies, and because the evidence showed that the tax was involuntarily paid.

We entertain no doubt of the right of the legislature to delegate the power to tax. This does not seem to be disputed, but it is contended that defendant, in exercising the power, so exercised it as to conflict with the provision of the Constitution then in force, "that all property subject to taxation ought to be taxed in proportion to its value." The question here presented was considered in the case of *Glasgow v. Rowse*, 43 Mo. 479, which involved the constitutionality of an act of the legislature imposing a tax on incomes, and it was held that such an act was not in conflict with the above constitutional requirement; and that the mandate that taxes on all property shall be in proportion to its value, does not include every species of taxation; that while it enjoins a uniform rule in impos-

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ing taxes on property, it does not abridge the power of the legislature to provide revenue from other sources. It has also been held that the power of the legislature to tax all professions is unquestioned, and the State might delegate the authority, but it should be done in clear and unmistakable terms. *St. Louis v. Laughlin*, 49 Mo. 559; *Simmons v. State*, 12 id. 268.

In defendant's charter the power to tax as well as to license and regulate express companies or their agencies is in plain terms conferred by the legislature. It may be conceded that if it appeared that the power conferred was simply to license and regulate the occupation or pursuit of express companies, it would not authorize the levying of a tax on the occupation unless it clearly appeared that such was the legislative intent in conferring it. 1 Dill. 292. But here the power to tax is expressly given, and hence the argument of counsel does not apply. In exercising the power thus delegated, the city council might adopt any method of taxation which the legislature might have adopted, and as it has been expressly decided that the legislature might impose a tax upon incomes, it follows that the defendant, through its council, might, as it in fact did, impose a tax on the income of defendant, the gross receipts being in effect the gross income. It is argued that the tax complained of is illegal, because under the ordinance express companies are taxed in a different manner from merchants. We do not perceive the force of the reasoning. The city council, in exercising the power to tax the various classes of pursuits mentioned in the ordinance, could not well apply the same rule to all of them, nor do we think it was the purpose of the legislature to require them to do so. If, however, the defendant, in its ordinance, had provided one mode of taxing one express company, and another and different mode for another company engaged in the same business, such ordinance would have been open to the objection urged as destroying equality and uniformity. A provision in the Constitution of Louisiana declaring that all taxation "shall be equal and uniform throughout the State," even if it extends to municipal taxation, is not violated by a legislative provision authorizing the taxation by municipalities of callings, trades and professions, exercised within their limits; and taxation of this kind is equal and uniform, if all persons engaged in the same business are taxed alike. 2 Dill. Mun. Corp., § 593.

But it is said that as the business of plaintiff consisted in
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receiving packages to be transported from St. Joseph to other points outside of the State, to which plaintiff's line did not extend, the tax upon the gross receipts of plaintiff was violative of that provision of the Constitution of the United States confiding to Congress alone the power to regulate commerce with foreign nations and among the several States. In the case of *Erie Railroad Company v. Pennsylvania*, 15 Wall. 284, it was expressly held that a statute of a State imposing a tax upon the gross receipts of railroad companies is not repugnant to the Constitution, though the gross receipts are made up in part from freights received for transportation from that State to another State; that such a tax is neither a regulation of inter-State commerce, nor a tax on imports nor exports, nor upon inter-State transportation.

It is also argued that the tax was illegal, because the gross receipts upon which it was paid were not received by plaintiff "as a compensation for the transaction of such express business in the city of St. Joseph." This objection is based on the evidence of one Worden, who was the general agent of plaintiff, who testified that he could not certainly distinguish how much was paid to other companies, but did not believe that the net earnings of the plaintiff for the year 1872 exceeded fifteen per cent of the gross amount, and that out of this latter amount received for the year 1872, a part was paid out to other express companies, *pro rata*, for carrying freight, a part for the hire of hands and in other general expenses in running their business, and in feeding and taking care of its stock. This witness also testifies that he made the quarterly report for the company on the 1st of January, 1873. Now, according to this report made by the plaintiff, the gross receipts amounted to the sum of \$11,548.70 for the year 1872, and the tax was collected on the data furnished by plaintiff, and it matters not that the witness testified that the net earnings amounted only to fifteen per cent of the gross earnings, the balance being consumed in expenses, etc. It was the gross earnings which was the subject of the tax, and they were received as compensation for the transaction of express business, although a considerable part thereof may have been consumed in expenses incurred in conducting it. If, even in strictness, the amounts paid to other companies *pro rata*, for transportation out of the State, should have been deducted from the gross receipts of plaintiff, it should have been done by the company when required under oath to make a statement on the first day of January, as to the gross receipts for the business of the previous year.

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Under the views above expressed, it is wholly immaterial whether the payment of the tax sought to be recovered back was voluntary or involuntary. Assuming the payment to have been made involuntarily, still the plaintiff could not recover unless the tax was illegal and unauthorized, and, as we perceive no illegality in the tax, either for want of power in the city council to impose it, or in the manner in which it was imposed, the judgment will be affirmed, with the concurrence of the other judges. *Judgment affirmed.*

STATE V. DAVIS.

(66 Mo. 624.)

Criminal law — defendant's waiver of full panel of jurors.

On the trial of an indictment, the prosecuting attorney proposed to go to trial with less than the legal number of names of jurors in the box to be drawn from. The defendant's attorney consented. The prisoner being convicted, *held*, that such consent did not validate the conviction.*

INDICTMENT for robbery. The opinion states the facts.

B. L. Woodson and Rucker Bros., for appellant.

J. L. Smith, attorney-general, for the State, cited *State v. Marshall*, 36 Mo. 400; *State v. Hays*, 23 id. 287; *State v. Holme*, 54 id. 153; *State v. Jackson*, 12 La. Ann. 679; *State v. Vester*, 23 id. 620; *State v. Axiom*, id. 621; *People v. Coffman*, 24 Cal. 230; *Proffatt on Jury Trials*, § 198.

SHERWOOD, C. J. Defendant was indicted for robbery in the first degree, convicted, and his punishment assessed at the lowest statutory limit.

I. When the defendant was arraigned, there were but 24 of the regular panel of jurors in the box; seeing this, the court ordered the marshal to summon six additional ones, whereupon the prosecuting attorney asked the attorneys of defendant to waive the bringing in and swearing of the six additional ones, which defendant's attorneys consented to do. Thereupon the prosecuting attorney struck off three men, and the defendant's attorneys nine men, and the remaining twelve were sworn as a jury. In indictments

*See *Cancemi v. People*, 18 N. Y. 128.

for the offense charged, the accused is entitled to a panel of 20 jurors. It is provided : There shall be summoned and returned in every criminal cause a number of qualified jurors equal to the number of peremptory challenges, and twelve in addition ; and no party shall be required to make peremptory challenges before a panel of such number of competent jurors shall be obtained. 2 W. S. 1102, § 7.

The minimum of punishment for robbery in the first degree is ten years (1 W. S. 456, § 23) ; and as "no limit to the duration of such imprisonment is declared, the defendant was entitled to twelve peremptory challenges (2 id. 1102, § 4), and the State to six. Id., § 6. The court should have enforced the order for summoning six additional jurors, and promptly rebuked the prosecuting attorney when making his improper proposal to the opposing counsel. When one indicted for a felony appears for his trial, he comes into the court room bearing the stigma of an indictment, every eye is fixed on him with scrutinizing suspicion ; he is decidedly below par, carries weight, and "is under a cloud." Though technically free and presumptively innocent, the beneficent presumptions of the law avail him but little ; morally he is in chains. He is, therefore, in no condition to object to scarcely any thing which the prosecuting attorney may propose, without incurring the hazard of increasing the suspicion which already clusters around him, and thus fatally prejudicing his cause. The very term "waiver" imports a voluntary act, and an act cannot be thus denominated when performed under conditions of practical compulsion. If the accused fails to object to an improper proposal coming from the representative of the State, he thereby loses a right guaranteed to him by the law. If he objects, he thereby jeopardizes his right to an impartial trial by jury, guaranteed to him by the Constitution. Under such circumstances, to hold the prisoner bound by an involuntary, so-called, and extorted consent, would be purely farcical, and the merest mockery of justice. We do not, by the above remarks, intend to be understood as meaning that the accused may not voluntarily, and of his own head, waive any right, short of a constitutional one ; but we do mean to assert that such waiver must be one in deed and in truth ; in reality, not alone in name and appearance ; not made as the result of what is, in effect, an intimidatory suggestion of the prosecuting attorney. *Brownlee v. Hewitt*, 1 Mo. App. 360 ; *Terry v. Buffington*, 11 Ga. 337. In *State v.*

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Hays, 23 Mo. 287, there was a full panel upon which the right of peremptory challenges could be exercised. In the *State v. Holme*, 54 Mo. 153, the judgment was reversed, because of non-compliance with the statute requiring that the first twelve names remaining on the list should be recorded. Two of such names were not thus recorded, and the error was held fatal. It is true objection was made at the time, but the opinion seems to be based, for the most part, on the clear and needless violation of a plain statutory provision. In the *State v. Mansfield*, 41 Mo. 470, it was said, when speaking in general of the right of the accused, "that the prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him:" and the remarks of ABBOTT, C. J., in *King v. Woolf*, 1 Chit. 401, are cited with approval, as to the evident impropriety of the prosecuting officer making a request of the defendant to which he cannot fail to accede without injuriously affecting him. If, in the case at bar, we give sanction to a course of conduct which deprives the defendant of three peremptory challenges, because the prosecuting attorney suggests it, the same principle, pushed to its logical conclusion, would, upon a like suggestion, deprive him of all peremptory challenges. The statute is very plain and of very easy observance, and the administration of public justice will be best observed by compelling prosecuting officers to keep within the line of their legitimate duty. This is only one of numerous instances where the attorney-general is called upon to perform the onerous task of offering argument in attempted justification of the acts of his subordinates. All necessity for this, as well as the large accumulation of criminal costs which it entails upon the State, can be readily obviated by simply observing that which the statute enjoins; that and nothing more. And the sooner this is understood by those who in the lower courts represent the State, the better will it be for her financial welfare. Under the old circuit attorney system, these departures from statutory provisions were by no means frequent; now, however, under the new regime, they are so common as to fail to excite comment.

[Two minor points omitted.]

As the cause must be retried because of the first mentioned error, we forbear further comment on the evidence, reverse the judgment and remand the cause. All concur.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

MORRA V. THE MAYOR, ETC.

(50 Ga. 166)

Criminal law — autrefois acquit.

Acquittal in a State court on a prosecution by the State for assault and battery will not protect the accused from subsequent trial and conviction in a municipal police court, under a city ordinance, upon the charge of disorderly conduct in fighting, though the same transaction and state of facts be involved in both trials.

CHARGE of disorderly conduct. The opinion states the facts.

W. A. Hawkins, Allen Fort and Peter Lamar, for plaintiff in error.

B. P. Hollis, for defendant.

BLECKLEY, J. In a special criminal court (provided for by the act of 1873, Pamph., p. 240), exercising jurisdiction over misdemeanors committed within the militia district in which the city of Americus is situated, a prisoner was duly tried for the offense of assault and battery, and acquitted. The accusation was based on the general law of assault and battery, and was in the name and behalf of the people of Georgia. Afterward, the prisoner was put

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upon trial before the mayor of Americus, charged by the mayor and city council with violating a city ordinance by disorderly conduct, in fighting within the city. The plea of former acquittal was relied upon, as well as the plea of not guilty. The corporation made out a case against him, by proving a certain fight in which he participated. The fight took place within a dwelling-house, at or near the door, and occurred late at night—about 3 o'clock, A. M. There were blows, a struggle and some noise. The prisoner introduced a copy of the proceedings in the District Court showing his acquittal, in that court, of assault and battery, and offered testimony to prove that the prosecution in that court was for the same transaction, and involved the same state of facts as the case on trial—that the two offenses were, in fact, one and the same. The mayor rejected the testimony, and sentenced the prisoner to a penalty under the city ordinance. He thereupon applied for a *certiorari*, which was refused. That refusal is complained of.

Only one ground of *certiorari* is insisted on, and that is the rejection of testimony going to support the defense of former acquittal. In the trial had before the State tribunal (the criminal court of the militia district) the prisoner's conduct was compared with the general Penal Code of the State, and was found not to be violative of that Code. In the trial before the mayor, the same conduct was compared with the city ordinances of Americus. The inquiry in the former trial was whether he had committed an assault and battery; in the latter, it was whether he had committed disorderly conduct in fighting. Disorderly conduct in fighting may include an assault and battery by the particular party to the fight who happens to be on trial, or it may not. In this instance it did not. That much was ascertained by the acquittal. But the city was concerned with the alleged criminal transaction, not as an assault and battery but as disorderly conduct within the limits of a municipal corporation where the preservation of good order is matter of local police. The prisoner may have acted contrary to sound and wholesome police though innocent of an assault and battery. He might not have been obliged to fight when and where he did, or with the degree of disturbance and noise that attended the combat. He engaged in the business in the dead hours of the night. Perhaps he could have put it off till the return of day-light. A night fight in a city is disorder of a grave character,

especially when attended with uproar. In *policing* such an occurrence, it must be searched, not for an assault and battery merely, but for all the criminal elements, however vague and minute, that militate against good order. Municipal government stands between the family and the State. It is in aid to both, and partakes of the nature of both. Police ordinances are at once family rules on a large scale, and State laws on a small scale. The city magistracy will not take cognizance of all misbehavior that a discreet parent would notice and correct in his household ; neither will it pass by all that the State has, or all that it has not, made penal. Its chief function in matters of police is to apply discipline, both preventive and punitive, where the authority of the family cannot be exerted, and where the authority of the State, as such, has not been put forth otherwise than by creating the municipality, and clothing it with power. This statement is not exhaustive, for much that lies within the family authority may be brought within the city ordinances also, either for the purpose of aiding that authority when willing, or of keeping order without its assistance when it is indolent or unwilling. So, on the other hand, many transactions that are made penal by the general law of the State may, at the same time, afford material for a proper police ordinance. The State may deal only with the central element of a transaction which is fringed all round with adjuncts that ought to be prohibited by ordinance as highly mischievous to the quiet of municipal society. In the country, such adjuncts might not need repression, for there they might be comparatively harmless. In a city, we think, a man may fight in a way to violate an ordinance, without being guilty of an assault and battery. We take it for granted that there was a valid ordinance applicable to the case, as nothing to the contrary is suggested in the record.

Cited by counsel : Cooley on Const. Lim. 199, and notes. Compare *Floyd v. Eatonton*, 14 Ga. 354; *Savannah v. Hussey*, 21 id. 80; *Jenkins v. Thomasville*, 35 id. 145; *Nason v. Augusta*, 38 id. 542; *Reich v. State*, 53 id. 73.

Judgment affirmed.

SMITH V. THE STATE.

(59 Ga. 513.)

Criminal law — verdict in absence of prisoner.

After the jury have dispersed, with the prisoner's consent, leaving the verdict with the foreman, to be returned by him into court, it is not indispensable that the prisoner should be present when the act of return takes place in pursuance of the consent; and though he be confined in jail at the time, the verdict will not, on that account, be illegal. (*See note, p. 394.*)

CONVICTION of assault with intent to murder. Motion for a new trial was overruled, and defendant excepted. The remaining facts appear in the opinion.

W. A. Hawkins, J. R. McClesky, Simmons & Simmons, for plaintiff in error.

C. B. Hudson, solicitor-general, and *B. P. Hollis*, for the State.

BLECKLEY, J. 1. There was a consent for the jury to disperse after the verdict was agreed upon, and for the verdict to be returned into court by the foreman next morning. This, in effect, was to bring the trial to an end when the jury made a verdict and separated. 49 Ga. 458. From that time forth, the strict legal harness was off, and the consent was to have its consequences, one of which was, that the right to poll the jury was gone. 6 Ga. 458; 36 id. 380. The waiver of that right was a necessary incident of the consent, after the jury had separated in pursuance of instructions from the court, founded on the same. It was, doubtless, an irregularity to receive the verdict in the absence of the prisoner. He ought to have been brought from the jail, so as to be present at the reception. But we think it was merely an irregularity, and that no matter of substance was involved. Having surrendered his right to poll the jury, no other of any value to him remained, for the exercise or protection of which his presence was important. Had he been in court, the result must have been the same as it was. Nothing took place in his absence, but the mechanical act of receiving the verdict, as the consent had provided it should be received. If

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he had been present, the act would have been no less mechanical. In *Nolan's Case*, 53 Ga. 137; 55 id. 521; 21 Am. Rep. 281, the event contemplated did not happen.

[Omitting minor points.]

Judgment affirmed.

NOTE BY THE REPORTER.—See *State v. White*, ante, p. 137. In *Lynch v. Commonwealth*, 6 W. Not. Cas. 392, it was held not to be ground for an order in arrest of judgment that the defendant in an indictment for larceny, who was out on bail, failed to appear upon call when the jury returned with their verdict, and that the verdict was received and sentence pronounced in his absence. ABBEY, C. J., who delivered the opinion of the court, reviewed the history of the criminal law of the State relating to larceny, and showed that that offense was not "one of those offenses which in this State were tried in the solemn forms of the court of England required by the act of 1718 to be adopted in cases then declared to be capital." In *Jacobs v. Com.*, 5 S. & R. 315, it was held that upon an indictment for larceny it was not necessary any arraignment should appear of record. The law is stated by Bishop (1 Crim. Pro., § 275) as follows: "If imprisonment is to be inflicted, or any other punishment higher than a fine, whether the crime is treason, felony, or misdemeanor, the defendant must be personally present." And Wharton says (3 Cr. L. 2949): "The better view is that in capital, if not in all felonies, the record must show that the defendant was present at trial, verdict and sentence." That he must be present upon an indictment for burglary is still the law in Pennsylvania. *Prine v. Com.*, 6 Harris, 108.

 SHEPPERD V. THE COUNTY COMMISSIONERS OF SUMPTER.

(56 Ga. 535.)

Constitutional law—business license.

A State statute requiring any person engaged in hiring laborers in the State for employment beyond the limits of the same to procure a license and pay therefor one hundred dollars, and making it penal to carry on the business without such license, is constitutional. Money properly paid into the county treasury, by a person who has applied for and obtained the license, cannot be recovered back, by mandamus or otherwise.

APPPLICATION for mandamus. The facts are stated in the opinion.

S. C. Elam, for plaintiffs in error.

B. P. Hollis, for defendants.

BLECKLEY, J. The act of February 16, 1876 (Pamph. 17), defines an emigrant agent to be any person engaged in hiring

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laborers in this State, to be employed beyond the limits of the same. It provides for a license, on payment of \$100 into the county treasury, and makes it penal for any person to carry on the business of an emigrant agent without first obtaining a license. In January, 1877, the plaintiffs in error, under the threat and the fear of being prosecuted and punished for carrying on business without a license, complied with the act, and their money went into the county treasury. They immediately applied to the county commissioners for an order upon the treasurer to refund it. The commissioners refused, and thereupon the plaintiffs petitioned for a mandamus. At the hearing, all the facts in the petition being admitted, the Superior Court refused the writ. This refusal is alleged to be erroneous.

The plaintiffs say the act of 1876 is unconstitutional, and that, as they paid their money under it, and in fear of prosecution, they are creditors of the county for the amount, and can recover it back. If they had a right, whether their appropriate remedy would be mandamus, *in the first instance*, we need not consider. The act seems to us constitutional. It requires a license as preliminary to carrying on a certain business, and exacts a license fee of one hundred dollars, which fee becomes county revenue. Whoever engages in the business is equally subject to the terms and provisions of the act. No discrimination is made in favor of residents over non-residents. It is said that the discrimination lies in requiring an expensive license as a condition of hiring laborers within the State to be employed beyond the State, without imposing a like burden on hiring for employment within the limits of the State. But the license required is for carrying on a business; and it does not appear that hiring for internal employment has become a business here, or is pursued as such by any person or persons. This is enough to dispose of the objection. But if it were otherwise, no authority has been cited, and we know of none, that would prevent the State from acting upon occupations (carried on within the State) in a way to incumber some of them with a tax or license fee, and leave other occupations, dissimilar in tendency, though not in nature, to the free will of those who might be inclined to engage in them. Suppose two rival establishments were in active operation in our midst, one engaged in offering the laboring population inducements to leave, and the other engaged in offering them inducements to remain, could not the State discriminate between

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the two in police and fiscal legislation? Would she be obliged to grant the same indulgence, and show the same favor, to an instrumentality which tended to depopulate her territory, as to one of opposite tendency? It is true, that to go out of the State for employment is not necessarily to remove or withdraw permanently; but, doubtless, a large percentage of hirelings who go out on contracts of employment never return. Persons who make it a business to hire laborers here for employment elsewhere may be required to procure and pay for a license. On the general subject, see Cooley on Tax. 384; *Home Ins. Co. v. Augusta*, 50 Ga. 530.

Judgment affirmed.

THE CITY OF ATLANTA V. WILSON.

(59 Ga. 644.)

Negligence — municipal corporation — runaway horse.

The plaintiff's horse took fright, turned over his buggy, and threw it down the embankment of the street upon which he was driving, and thus he was injured. *Held*, that if the city was negligent in constructing the embankment, in not providing it with necessary railing or other means of protection, and in not keeping the street in safe condition, and such negligence was the real cause of the injury (the jury being the judge of these matters as questions of fact), the plaintiff had a cause of action. (*See note*, p. 898.)

ACTION for negligence. The case is stated in the opinion.

W. T. Newman, for plaintiff in error.

L. J. Green & Son, Jno. T. Glenn, McCay & Tripye, for defendant.

BLECKLEY, J. The declaration was demurred to generally, and the demurrer was overruled. The question is, whether any cause of action is set forth. The case made is this: Harris street, one of the public streets of the city, is fifty feet wide. Near where it crosses a branch, the city has thrown up an embankment in the street, ten feet high and two hundred yards long. This embankment is only thirty-five feet wide, fifteen feet of the street being below the embankment. The city has neglected to erect any rail-

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ing or other means of protection along the embankment, for the safety of vehicles. To do this was its duty; the failure was negligence, and such negligence caused the injury now complained of. It was the duty of the city to keep the street in safe condition. By reason of the city's negligence and carelessness in erecting the embankment and leaving it in the unprotected condition described, the plaintiff has been damaged the sum of \$10,000, in this: on the 30th of June, 1875, he was driving his buggy, with himself and three small children in the same, along said street, upon the embankment, when, without fault or negligence on his part, the horses attached to the buggy became frightened at the blowing of a steam whistle in a manufacturing establishment, and made a sudden and unexpected jerk, detaching a single-tree (the same being in good order), which struck against the legs of one of the horses, causing him to turn suddenly and upset the buggy, throwing it down the embankment, and thereby dislocating the right knee of the plaintiff, and causing other injuries to himself and his children. The injury to the knee is permanent, has made his leg crooked, and will cause him pain and suffering as long as he lives. He has been subjected to great expense and loss of time; has been compelled to pay physician's bills to the amount of \$500; has been confined to his bed for two months, and is still unable to walk about and attend to business, and is suffering great bodily pain. He could not prevent the fright of the horses, nor the detaching of the single-tree.

It will be observed that the declaration alleges negligence on the part of the defendant, specifies in what it consisted, and avers that it caused the injury. The demurrer admits all this to be true, as well as the nature of the injury, the plaintiff's freedom from fault, and the fact and extent of his damage. In Georgia, negligence is held to be a question of fact for the jury. We have no doubt that the declaration is sufficient in law, if the jury shall believe it fully proved. It will be for them to decide whether the street, under all the circumstances, was less safe than it should have been, and whether its unsafe condition was the real cause of the injury. The city was bound to ordinary and reasonable diligence, and the plaintiff was entitled to such protection as that diligence would afford—nothing more and nothing less. Negligence contributing to the injury would render the defendant liable, but any negligence which did not harm the plaintiff would be, as to him, as if it were not.

The whole matter is for the jury, under proper instructions from the bench.

Cited for plaintiff in error : What demurrer admits, 4 Ga. 520; 49 id. 419; Code, § 3332; Stephens' Pl. 143. Negligence as cause of injury, Dill. on Mun. Corp., § 788; *Mitchell v. Black*, 7 Gray, 100, 104; *Howard v. Bridgewater*, 16 Pick. 189; *Shepherd v. Chelsea*, 4 Allen, 113; *Titus v. Northbridge*, 97 Mass. 258, 266; *Fogg v. Nahant*, 98 id. 578; *Underwood v. Brown*, 106 id. 298; *Moore v. Abbott*, 32 Me. 46; *Farrar v. Greene*, id. 574; *Moulton v. Sanford*, 51 id. 127; *Jackson v. Bellevue*, 30 Wis. 250; *Coy v. U. & S. R. R. Co.*, 23 Barb. 643; *Daniels v. Atkins*, 55 Ga. 609. Whart. on Neg., § 103, *et seq.*

For defendant : *Palmer v. Andover*, 2 Cush. 600; *Winship v. Enfield*, 42 N. H. 197; *Manderschid v. Dubuque*, 25 Iowa, 108; *Lacon v. Page*, 48 Ill. 499; *Joliet v. Verley*, 35 id. 63; Am. Law Times, June, 1876, p. 92; Code, §§ 2972, 3072; *Flanders v. Meath*, 27 Ga. 358.

Judgment affirmed.

NOTE BY THE REPORTER. — On the vexed question of the liability of municipal corporation for an injury produced by a defect in a street to a runaway horse, the recent discussion of the New York Court of Appeals in the case of *Ring v. The City of Cohoes* decided April 15, 1879, is in harmony with the principal case. The following abstract of it is from 19 Alb. L. Jour. 359 :

The plaintiff was driving a blind horse harnessed to a sleigh on the street of a city; the street was thirty feet wide between curbs; on the west side there was a heap of ashes twenty feet wide, three feet high, and extending eleven feet into the street, leaving a roadway of nineteen feet; a loaded wagon was coming southerly next the ashes, leaving about twelve feet clear; the plaintiff's horse, going north, became frightened, and began to run; the plaintiff was unable to restrain or guide him, and he ran so near a hydrant on the east side, opposite the wagon, as to strike the nozzle with the cross-bar of the sleigh, and plaintiff was thrown against the hydrant and injured; the referee found that the plaintiff was free from fault, and that the city was in fault for suffering the ashes in the street, and for suffering the hydrant nozzle to project into the street. *Held*, that as to the hydrant the finding was erroneous, the nozzle projecting only four inches over the gutter; and it not appearing, or being found that the ashes caused the accident, no liability can be based on the negligence of the city in respect to that. The city is not bound to furnish roads safe for horses to run away upon, but to furnish reasonably safe roads, and if it does not, and a traveller is injured in consequence of a culpable defect in the road, it is no defense that his horse was running away at the time. In Massachusetts, Maine and Wisconsin, municipal corporations are not bound to make their roads so that travellers shall be safe when their horses are unmanageable, frightened or running away. *Moulton v. Inhab. of Sanford*, 51 Me. 127; *Nichols v. Inhab. of Athens*, 66 id. 402; *Perkins v. Inhab. of Fayette*, 66 id. 156; *Davis v. Inhab. of Duxbury*, 4 Allen, 558; *Titus v. Inhab. of Northbridge*, 97 Mass. 258; *Fogg v. Inhab. of Nahant*, 98 id. 578; *Murdock v. Inhab. of Warwick*, 4 Gray, 178; *Dreher v. Inhab. of Fitchburg*, 22 Wis. 675; *Hause v. Inhab. of Fulton*, 29 id. 206; 9 Am. Rep. 568. But in Vermont, New Hampshire, Connecticut, Missouri, Pennsylvania, and Upper Canada, a different rule prevails. *Baldwin v. Turnpike Co.*, 40 Conn. 238; *Full v. City of Kansas*, 54 Mo. 601; 14 Am. Rep. 487; *Hunt v. Town of Poenat*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. City of Philadelphia*, 51 Penn. St. 44; 23 Am. Rep. 722;

Bently v. Terry.

Sherwood v. City of Hamilton, 37 U. C. Q. B. 410. When two causes combine to produce an injury to a traveller upon a highway, both of which are in their nature proximate, the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible, the municipality is liable provided the injury would not have been sustained but for such defect.

To the same effect is *Wilson v. City of Atlanta*, 60 Ga. 473. There the court say:

"It seems that the court was also of opinion that where there was a runaway of plaintiff's team there could be no recovery, no matter what was the negligence of defendant in respect to the streets — or in other words, as the assignment of error has it, that 'in a case where a swingle-tree becomes detached, and horses are frightened and run away, and run over an embankment, as in this case, a plaintiff cannot recover damages.' In our judgment, this ruling is too strong. There might be a case where the swingle-tree did become detached, and the horses did run away, and where the city would be liable. Concede that this embankment was not so wide as it is, and much higher from the level of the natural ground, and an accident happened and horses ran away, and the faulty plan or structure of the grading was the real cause of the damage, there could be a recovery, notwithstanding the running away of the horses. One object of good streets and roads is to protect against accidents. The street should be reasonably safe for ordinary travel, including such accidents as might, without fault on the part of the traveller, befall him."

BENTLY V. TERRY

(59 Ga. 553.)

Infancy — release of paternal right of custody.

The father of an infant may, by voluntary contract, release his parental power over his child to another.

The agreement to care for the child, and the fact that the child is taken when sick, and nursed into health and strength, and supported properly and comfortably for five years, are sufficient considerations to support such a contract; and the contract, though made with the wife by the child's father, will be enforced if acquiesced in by the husband, and is not revocable, except for sufficient legal reasons, such as bad treatment of the child and the like.

HABEAS CORPUS. The facts are stated in the opinion.

J. G. & W. C. McCall, for plaintiffs in error.

W. G. Turner, for defendants.

JACKSON, J. Mrs. Bently and Mrs. Terry are sisters. The latter has no children. When Mrs. Bently was sick and had lost a child, perhaps two, Mrs. Terry took the little daughter of her sister

home with her, and nursed the child, who was sick, into vigor and renewed life. She kept the child some five years ; sick for some time after she took her ; delicate up to a year or two ago ; has supported her comfortably and kindly all the time, without help from the little girl's parents. The child is now some eight years old, and was taken by Mrs. Terry when but two or three years old, and almost lifeless. The parents of the child now want the daughter back, and sued out a writ of *habeas corpus* for her; the judge decided in favor of the retention of the little girl by her aunt, Mrs. Terry. Mr. and Mrs. Bently, the parents, excepted to that judgment, and the case is before us for review.

In regard to the terms on which the child was taken by Mrs. Terry, the evidence is conflicting. The Terrys prove that the child was given to Mrs. Terry by Mr. Bently, by their own evidence and that of others. The Bentlys swear the contrary, and produce witnesses to show the contrary. The probabilities are that they may have misunderstood each other. However that may be, the judge below has passed upon the evidence, and he had a right to do so in case of conflict.

1. If the contract was made by Mr. Bently with Mrs. Terry, as she asserts, and tries to prove, there can be no doubt that he had power to dispose of the child. Section 1793 of the Code settles the point. It declares that "parental power is lost : 1. By voluntary contract releasing the right to a third person." This is precisely what Mr. Bently did in this case, with his daughter, according to Mrs. Terry's version of the agreement.

2. But it is said that there was no consideration for the contract, and that Mrs. Terry, being a married woman, could not make it. We think that the agreement to take the child home and nurse and care for the little girl as her own is a sufficient consideration to support such a contract, especially as it has been executed for five years on the part of Mrs. Terry. Nor do we think that she could not make such a contract under the circumstances of this case. Her husband acquiesces in it. He joins her in defense of this suit. He received the child at his house, and supports his wife throughout the transaction. The contract is binding both upon his wife and himself. Besides, this is a sort of matter that the wife will always manage, and the husband must object in time, if he does not wish to be bound by her acts. In the case of *Janes v. Cleghorn*, 54 Ga. 10, the contract there enforced was with a mar-

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ried woman. But it is clear that, in this case, the husband has ratified all that his wife did.

3. The contract when made and executed in part, as in this case, is clearly irrevocable by the parent, unless for good cause. This change of mind is not such good legal cause. It would be wrong to hold that, after the child has been nursed, and loved, and cherished under the contract for five years, it could be revoked at pleasure by the parent. If the child were badly treated, it might be annulled; if any other good reason arose, it could be set aside as any other contract which was violated; but for no cause at all, it cannot be. And so it was held in 54 Ga. 10, before cited.

[Omitting a minor point.]

Judgment affirmed.

ROUNTREE V. DENNARD.

(50 Ga. 629.)

Statutory construction — exemption — head of family.

The law provided that "each head of a family or guardian of a family of minor children" should be entitled to a homestead. *Held*, that the guardian of one minor child was entitled to a homestead.

QUESTION of homestead exemption. The facts are stated in the opinion.

B. M. Davis, Duncan & Miller, for plaintiff in error.

Warren & Grice, for defendants.

JACKSON, J. Rountree was the guardian of one minor child, who was the only child left by his father, and the question on appeal from the ordinary was whether such one child was entitled to a homestead and exemption as a family of minor children would have been entitled to under the Constitution and laws, and whether the guardian could have the same set apart for the benefit of one child just as for a family of more than one, if more had survived the father.

The court charged the jury that one child could not constitute a

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family of minor children in the sense of those words in the Constitution; the jury found against the application of the guardian, and the guardian excepted; and the question is, was the charge right?

We think that the charge was wrong. The Constitution declares that "each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of two thousand dollars, in specie, and personal property to the value of one thousand dollars, in specie, both to be valued at the time they are set apart." Code, § 5135.

It is clear that the head of a family, though the family be but one child, would be entitled to the homestead. The family would be the head and the child.

In case there should be no father or mother, then the guardian becomes the head of the family, and the minor and himself would constitute the family — the property being for the use of the child.

A minor — particularly a very young one — would live with the guardian, and be part of his family, and the property would be for a family, in contemplation of law, consisting of this guardian and child. It is true that it is ruled in 46 Ga. 231 that a widow, without any child, is not *the head* of a family; and that is right, for she is not; but suppose that she had one child, then she would have been, and she and the child would have been the family — she the head and the child the other part of it; or it may be, as she alone could not get the homestead, that the child alone would constitute the *family* of which she was the head. Can the child be deprived of the homestead because it has no father or mother?

Was this the spirit and sense of the Constitution? We think not; but that it was intended to give to orphans, whether one or more, the same rights as to other children whose parents was alive, and the fact that a man has a family is true, whether that family be one child or many; and the fact that a widow has a family is also true, whether her husband left her with one child or more.

For these reasons, looking at the reason and spirit of the Constitution, and the law which copies it — Code, § 2002 — and not sticking in its bare letter, we have no doubt that the court below erred in his construction, and we reverse the judgment.

Judgment reversed.

CHARLOTTE, COLUMBIA AND AUGUSTA R. R. Co. v. GOW.

(39 Ga. 685.)

Principal and surety — laches of principal.

The agent of a corporation, being under bond to account and pay over daily, cannot be trusted with more money at his surety's risk after dishonesty of the agent is discovered by the corporation. But he may be so trusted, so long as the circumstances, fairly interpreted, point, not to moral turpitude, but to a want of diligence or punctuality rather than to a want of integrity.

ACTION on bond. The opinion states the facts.

H. Clay Foster, for plaintiff in error.

John T. Shewmake, for defendants.

BLECKLEY, J. The action (commenced March 11, 1874) is by a corporation, obligee in a bond, against the obligors, Wyly as principal, and Gow and another Wyly as sureties. The bond bears date November 21, 1871, is in the penal sum of five thousand dollars, and the obligors are bound, jointly and severally, for the payment thereof; the obligation, however, to be void on condition that the obligor Wyly (the principal) shall well and faithfully execute, perform and discharge all the duties as agent of the corporation, and shall require all the freight charges and passenger fares to be paid in cash, and account to the corporation therefor daily, and transmit or pay over all money so received to the treasurer or proper officer of the corporation — said payments to be made daily — and deliver to all owners all goods, chattels or merchandise which may arrive, or be committed to his care or charge, as agent at the Augusta depot, or at any depot where he may be placed in charge of business of the corporation, and collect freight charges according to the terms and rates prescribed by the corporation. The breaches assigned in the declaration are, that Wyly failed to well and faithfully execute, perform and discharge all the duties as agent of the corporation; that he did not require all the freight charges and passenger fares to be paid in cash; that he did not account to the corporation therefor daily, and transmit or pay

over all money so received to the treasurer or proper officer of the corporation daily; that he failed to collect all freight charges in cash and transmit or pay over to the treasurer or proper officer of the corporation all money received from freights and passenger fares, but retained and refuses to account for six thousand dollars so had and received. Gow alone defended. He pleaded "not indebted," and that the plaintiff failed and neglected to enforce so much of the condition as required of the principal daily accounts of cash received, and daily remittances and daily payments to the proper officer of the corporation, and payment in cash for freight charges, but on the contrary allowed, consented to, agreed and required accounts and remittances at longer intervals, and consented to, agreed and connived at the delivery of freights upon credit, without the consent or knowledge of Gow, whereby his risk was increased and he exposed to greater liability. There was a further special plea, but it was not insisted on. The evidence, as condensed by the reporter, will appear in the report.

Most of the cases cited by counsel, as well as some others, we have examined. Special attention should be directed to *Pittsburg, Fort Wayne and Chicago Railway Co. v. Shaeffer*, 59 Penn. St. 350; *Atlas Bank v. Brownell*, 9 R. I. 168; 11 Am. Rep. 231; *McKecknie v. Ward*, 58 N. Y. 541; 17 Am. Rep. 281; *Phillips v. Foxall*, L. R., 7 Q. B. 666; and *Sanderson v. Aston*, L. R., 8 Exch. 73. While, from these authorities and those they refer to, we have derived much assistance, we have not considered that they rule for us the precise case before us.

1. When the agent of a corporation, appointed for an indefinite time, is under bond to account and pay over daily, and he fails to perform for one day, or any number of days, whether he can be afterward trusted with additional funds at the risk of the surety upon his bond, consistently with good faith and fair dealing, without first giving notice to the surety, depends upon the apparent cause of his failure. If the corporation, or its supervising officers, have reason to believe that it results from dishonest practices or intentions, such as a conversion of the money, or a purpose to convert it, no further funds can rightfully be committed to his custody. If, on the other hand, the circumstances do not point to moral turpitude, but to lax habits of business, mere negligence, procrastination, a want of diligence or punctuality rather than a want of honesty, the corporation may continue to trust him, treating his

successive failures in promptness as breaches of contract only, and relying upon the bond for protection should ultimate loss occur. When a thief is detected, confidence ought to be withdrawn, at least until those who are likely to be injured by his larcenies have been warned. To persist in supplying him with money after he has made up his mind to steal, and you know it, is contrary to sound morality, unless you mean to bear the loss yourself. Considerations, not of contract only, but of crime, are involved. A question of honesty is raised, and honesty and equity are one. You cannot knowingly expose your own to the grasp of known dishonesty, at another man's risk, he being absent and unwarned. To do so and make him bear the consequences, is to do, not equity, but iniquity. On the other hand, indolence, carelessness, inattention to business, want of promptness, a disposition to put off and procrastinate, are failings that, for the most part, stay outside of the Penal Code, and may consist with moral integrity. Of such infirmities and their consequences, a surety may be supposed to have considered, once for all, when he entered into his contract. They are, so to speak, insurable, though hazardous; and the underwriter may be left to take care of himself. When they furnish the apparent reason why money and accounts are not forthcoming at the time or times appointed, the case is not desperate, and business may proceed. Other explanations of delay may be consistent with honesty. In naming some, it is not meant to suggest that the enumeration is complete.

2. For the agent's deviation in performance, from the terms of the bond, as set out in the condition, to be ground for the discharging his surety (except on the score of continuing the trust after known dishonesty), the deviation must be rightful and not wrongful. Wrongful deviation would be a breach of the condition, and, of course, would tend to hold the surety and not to free him. For a deviation to be rightful, it must rest, either on convention or on instructions. Any change of terms, by a new agreement between the corporation and the agent, being made without the surety's consent, the surety would no longer be bound except to answer for a prior breach, if any had occurred. So, if without any new agreement, the agent be instructed by the corporation to disregard any of the terms of the condition favorable to the surety, and he does so, the surety is thereby discharged. Even a *nudum pactum*, acted upon and executed, would be effective as instructions from the cor-

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poration to the agent, and would work the same result. This is because the agent, though under bond, is to be guided by the will of the corporation, his master. Being subject to its orders, his obedience to its commands could not be a breach of his obligation. But care is to be taken, whether in the case of agreement or instructions, that the will of the corporation has been duly expressed or signified. Novation, to be recognized as such, must take place through an officer or agent having power to contract in the premises on the corporate behalf. So, instructions must proceed from the officer or agent whose business it is to make known the corporate will in like cases generally, or in the particular instance by special authority. It will be unsafe to treat a new contract as existing, or certain instructions as duly given, without scrutinizing the powers of those officers or agents concerned in the transaction. To group them under the designation of "superior officers," and there stop, will not be sufficient, unless the evidence shall warrant the inference of ratification by competent authority; as to which, see 18 Ga. 431, 432; 20 id. 276. Implied contract, or implied instructions, if clearly established, would have the same effect as express contract or express instructions. But the implication should be absolutely necessary, under the evidence, and rise to such force as to be equivalent to open and direct expression. In dealing with so solemn an instrument as a specialty, its regular legal operation should not be varied by matters resting on inference, without great strength of conviction as to the precise matters alleged.

We have now sketched the principles which we deem applicable to the case before us, in the light of the pleadings and the evidence. The surety is discharged if the corporation discovered dishonesty in the agent and afterward intrusted him with more funds, without first giving some notice or warning to the surety; or if the agent deviated in performance from the conditions of the bond, rightfully; which he could not do except by contract or under instructions, either express, or so plainly and certainly implied as to be equally definite and free from doubt as if openly and directly expressed. Of course, any discharge, by whatever means effected, would not operate retrospectively, so as to exempt from suit for breaches previously occurring. Notice of such breaches would not be necessary to perfect the right of action, or to preserve it throughout the period allowed for suit by the statute of limitations. See

what is said upon the subject of notice in *Wright v. Shorter*, 56 Ga. 77, 78.

3. It remains to consider the several points in the court's charge to the jury, complained of in the motion for new trial. The exact language of the charge is quoted from the record:

(a) "That if the jury find from the evidence that plaintiff departed from the terms of the contract set out in the bond, by authorizing, or consenting to, or conniving at, the delivery of freights on a credit by Wyly, without the consent or knowledge of Gow, the surety, then the surety, Gow, is not liable in this action for losses resulting from such credit deliveries."

We think this paragraph of the charge erroneous, because the contract set out in the bond does not stipulate for any thing inconsistent with a grant of authority, at the will of the corporation, to deliver freights on a credit. On the contrary, the agent undertook to collect all freight charges according to the terms and rates prescribed by the company. The terms were at the control of the corporation, and the agent's duty was to obey instructions. Compliance with instructions would be compliance with the bond touching this part of his duty. After proving such compliance in making delivery and in efforts to collect after delivery, neither the agent nor his surety would be answerable for failure to collect. Losses which resulted from the terms, and not from neglect of the agent to carry them out, must be borne by the company. The chief objection to the paragraph is, that it misconstrues the contract, and puts the jury to looking for a departure where there could be none. So we think.

(b) "In determining these questions of change of contract—consent—connivance, and authority, and knowledge of violations and breaches of contract, you will look to acts as well as words of parties—also omissions and silence of parties, and ascertain therefrom, and all other evidence, the conduct and intent of parties in relation to the matters in dispute," adding thereto, "and if plaintiff knew of such violation, and did not object, then assent may be inferred."

This part of the charge, except the concluding propositions, seems obscure. Perhaps it was plain to the jury, for they had it in its due order and connection. The silence of a corporation is not in itself a matter from which much can be inferred against it. Knowledge, attended with failure to object, unless the jury should

believe the circumstances called for objection, would be no basis for an inference. What facts will enable the jury to infer other facts is generally matter for the jury to decide for themselves. Besides, a contract secured by an agent's bond ought to be kept until the corporation contracts change it, or until the agent is instructed not to execute it. Why should the agent violate it, and take license, from the mere silence of the corporation, to repeat the violation over and over? The agent and the surety undertake that their bond shall be performed. The corporation is not bound to see to the performance as to matters which come clearly within the surety's undertaking.

(c) "Any change of the terms of the bond, without the consent of the surety, within the knowledge of plaintiff, or the superior officers of Wyly, by which losses accrued, cannot be charged to the surety. Hence if the default of Wyly was by reason of non-payment of freights before delivery, or non-transmission of collections daily, with the knowledge, permission or consent of plaintiff, he is not liable therefor, and your verdict should be for the defendant, Gow." Mere knowledge of the corporation would not be sufficient to work discharge, nor would that of the agent's superior officers, as a class. What officers are referred to, and what are their powers and duties, would be material even if their knowledge would suffice. We have already said that a departure by the agent from the terms of the bond, unless known to be dishonest in act or purpose, would not discharge the surety, unless done by contract, or in pursuance of instructions. Any other departure would be simple breach of the bond, and instead of being a reason for letting the surety off, would be the best of reasons for holding him liable and making him pay."

(d) "No delay or non-action by plaintiff in compelling payments, or allowing freights delivered without payment, unless for a consideration or benefit to plaintiff, will discharge the surety unless loss accrued thereby to securities held, or it amounted to such conduct on the part of plaintiff as to so change the contract or bond as to increase the risk of the surety." If the jury understood this paragraph, it probably did no harm. We think, however, it is too vague, and that it should be omitted when the case is tried again. The vagueness is principally in the words "such conduct," and in the possible implication that delay or non-action might work a change in the contract.

(e) "If the maker, Wylly, permitted goods to be delivered without payment of freights, and loss accrued therefrom, and the plaintiff knew of such delivery without prepayment, the surety, Gow, cannot be charged with such a loss." This is undoubtedly erroneous. In the first place, it assumes that delivery without prepayment of charges would infringe the condition of the bond, though sanctioned by the company. This, we have said, is not our construction of the language of the condition. But if it would infringe the condition, surely knowledge by the company, especially without reference to the time of acquiring it, would not be enough to saddle the company with the loss. The truth is that whether the agent or the company should be the loser as to freight charges not collected, depends upon whether the agent complied with or violated his instructions.

(f) "One of the requirements of the bond being that Wylly should make daily settlements, if the plaintiff permitted, allowed or consented to, weekly or monthly payments, and losses thereby accrued, the surety, Gow, cannot be charged therewith." We think this was error. It would be quite right to permit all the payments, whether daily, weekly or monthly, that the agent would make. If the plaintiff, by contract or instructions, dispensed with daily payments, and authorized weekly or monthly payments in lieu thereof, the risk of the surety was increased, and he was discharged from that time forth. We will add that general orders, such as appear in the record, are not necessarily inconsistent with the condition of the bond. They stand to this contract somewhat as general statutes do to a particular statute. It would be altogether practicable, and might be altogether reasonable, to have special regulations for the Augusta agency depending upon specific contract—such a contract as the condition of the bond sets forth.

(g) "This is a bond for the faithful performance by Wylly of the duties of agent for plaintiffs, and in two of its most important stipulations, the manner of its performance is specifically stated; any change of its mode and manner of performance by the agent with the consent, knowledge or approbation of the plaintiffs, by which the risk of the surety was increased, or from which losses accrued, will discharge, and you should so find."

Omitting the word "knowledge," this paragraph may be deemed correct; but what will constitute consent or approbation should be squared with what has been said in reference to contract and in-

structions. Moreover, that discharge as to latter breaches would not necessarily involve discharge as to earlier ones should not be lost sight of.

Cited for the corporation : *Pittsburg, Ft. W., etc., R. R. Co. v. Schaeffer*, 59 Penn. St. 350 ; *Oberndorf v. Union Bank*, 1 Am. Rep. 31 ; *Woolfolk v. Plant*, 46 Ga. 426 ; *Crawford v. Garden*, 33 id. 173, 184 ; *Bonner v. Nelson*, 57 id. 433 ; *Goodwyn v. Hightower*, 30 id. 249 ; *Hollingsworth v. Tanner*, 44 id. 12 ; Code, § 2154 ; *Greeley v. Dow*, 2 Metc. 176 ; *Wagman v. Hoag*, 14 Barb. 232 ; 46 Tenn. 263 ; *Leavitt v. Savage*, 16 Me. 72 ; *Bailey v. Adams*, 10 N. H. 162 ; *Sawyer v. Patterson*, 11 Ala. 523 ; *Farmers' Bank v. Reynolds*, 13 Ohio St. 84 ; *Lumsden v. Leonard*, 55 Ga. 374 ; *Crawford v. Faulden*, 33 id. 173 ; *Reid v. Flipper*, 47 id. 273 ; *McKecknie v. Ward*, 58 N. Y. 541 ; 17 Am. Rep. 281 ; *Pitts., Ft. W., &c., R. R. Co. v. Schaeffer*, 8 Am. L. Reg. (N. S.) 110 ; *Atlas Bank v. Brownell*, 11 Am. Rep. 232 ; *London Assur. Co. v. Buckle*, 4 J. B. Moore, 153 ; *Toomer v. Dickerson*, 37 Ga. 438 ; *Stewart v. Barrow*, 55 id. 664 ; *Clark v. Sickles*, 21 Am. Rep. 608 ; *Angell & Ames on Corp.*, § 321 ; *Murror v. Mech. Bank*, 7 Curtis (U. S.), 446, 454 ; *Graves v. Lebanon Nat. Bank*, 19 Am. Rep. 53 ; *Amherst Bank v. Root*, 2 Metc. 541 ; *Jones v. U. S.*, 18 Wall. 662 ; Code, § 2154 ; *Lumsden v. Leonard*, 55 Ga. 374 ; *Stewart v. Barrow*, id. 664 ; *Bonner v. Nelson*, 57 id. 433 ; *Reid v. Flipper*, 47 id. 273 ; *Sullivan v. Hugely*, 48 id. 489 ; *Corn Ex. Ins. v. Babcock*, 1 Am. Rep. 606.

Cited for the surety : 3 Pars. on Cont. 356 ; De Colyar on Guarantees, 432, 434 ; *Taylor v. Governor*, 17 Ga. 534 (3), (4) ; *Hayes v. Little*, 52 id. 555 ; Code of 1873, §§ 2153-4 ; DeColyar on Guarantees, 276, 394, 396 ; *Davies v. Byrne*, 10 Ga. 235 ; *Atlanta Nat. Bank v. Douglass*, 51 id. 205 ; 11 Eng. C. L. (5 B. & C.), 458 ; De Colyar on Guarantees, 324, 376, 385 ; *Hunt v. Roberts*, 45 N. Y. 691 ; *Phillips v. Foxall*, L. R., 7 Q. B. 666, July, 1872 ; *McKecknie v. Ward*, 17 Am. Rep. 281 ; *Atlas Bank v. Brownell*, 11 id. 231 ; *Pidcock v. Bishop*, 3 B. & C. 605 (10 Eng. C. L.) ; *Atlanta N. Bk. v. Douglass*, 51 Ga. 205 ; 1 Greenl. Ev., § 48 ; *Chapman v. Macon*, 55 Ga. 566 ; *Nelson v. R. R. & B. Co.*, 48 id. 152 ; *Atlanta v. Perdue*, 53 id. 607 ; *Casteberry v. Scandrett*, 20 id. 245 ; (8) ; *Bryant v. Booze*, 55 id. 438 ; *Veasey v. Graham*, 17 id. 99 ; Code, § 2200 ; *Bryan v. Watson*, 20 Ga. 480 (11 request), (12) ; *Bray v. Gunn*, 53 id. 144 ; 1 Greenl. Ev. 48 ; Story on Agency, § 95 ; *Newton v. Brice*, 41 Ga. 186 ; *Statham v. State*, id. 507. Judgment reversed.

THE WESTERN RAILROAD V. THOMAS.

(80 Ga. 312.)

Action for obstructing levy — who may maintain.

The agent of a railroad company obstructed an officer in levying an attachment upon goods loaded upon one of the trains of the company, and removed the goods out of the State by running out the train. *Held*, not to furnish a cause of action against the company, at the instance of the plaintiff in attachment.

ACTION for damages. The report gives no facts other than those indicated in the head note.

Joseph F. Pou, for plaintiff in error.

Hatcher & Goetchius, for defendant.

BLECKLEY, J. To aid a debtor in removing his property out of the State is not an actionable injury to the creditor. This is the rule where process of seizure has not issued. 19 Ga. 141. That a debtor after arrest has been rescued by a mob is no excuse to officer. 20 id. 598. No case exactly like the present was produced in the argument, and none such is known to us. The two just cited are as near in point as any we have been able to find. They would seem to suggest, if not to furnish, a rule of decision for the case before us. A ministerial officer, armed with due process of law and acting within it, is the servant of the State and not of the plaintiff. Resistance to him is resistance to the public authority, and is a penal offense. Code, § 4476. He can command assistance, and must do it at his peril when he is in a situation to require it. He can summon a *posse*, and with their support carry his process into execution. If it was his duty to make the levy, and he failed to do it, the plaintiff's remedy is against him, and not against those who obstructed him. Civilly considered, the obstruction was an injury to him, not to the plaintiff. If the officer could have made the levy had there been no resistance, then, in contemplation of law, he could have made it in spite of the resistance. It does

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not appear that he commanded assistance, or that there was none at hand.

The court erred in sustaining the *certiorari*.

Cited in argument, *Garaway v. Atlanta & W. P. R. R. Co.*, 58 Ga. 216; 1 Redf. on Railways, p. 535 *et seq.*; Code, §§ 2951, 2962, 3033; *Savannah, G., etc., R. R. Co. v. Wilcox*, 48 Ga. 432; 1 Black, 101; *Paget v. Perchard*, 1 Espinasse, 205, and note.

Judgment reversed.

WILLIAMS V. STATE OF GEORGIA.

(60 Ga. 367.)

Criminal law — limiting time of prisoner's counsel in addressing jury.

In the trial of a felony, whether the prisoner is heard through one counsel or two, the length of the argument is not a matter for pre-determination by the court. As argument progresses, the court may confine the range of it to the facts and law of the case, and may interdict idle repetition; but so long as counsel speaks to the point, proceeds in good faith, and wastes no time, the court should forbear to interfere, but leave the limits of the speech to the discretion of the speaker, until it is manifest that the discussion is complete, or the subject exhausted. (*See note*, p. 413.)

INDICTMENT for larceny. The opinion states the facts.

H. C. Erwin, Dessau & Strohecker, for plaintiff in error.

C. L. Bartlett, solicitor-general, by *W. A. Lofton*, for State.

BLECKLEY, J. [Omitting a minor point.] The length of argument, in the trial of a felony, is not a matter for pre-determination by the court. How can the court know, in hours and minutes, how long the argument ought to be? There is no rule of practice that settles it, and the judge cannot settle it by what he may suppose sufficient. As argument progresses, he may confine its range to the facts and law of the case, and may interdict idle repetition; but while counsel speak to the point, and proceed in good faith, wasting no time, how can the court forbear

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to be patient, and hear what is said? When it is manifest that the discussion is complete, and the subject exhausted, a stop may be ordered.

[Omitting minor points.]

Judgment reversed.

NOTE BY THE REPORTER. — In *White v. People*, 8 Cent. L. J. 273, the Supreme Court of Illinois held that upon the trial of an indictment the defendant has a constitutional right to ample time for the argument of his case before the jury, and that a limitation of five minutes to counsel for the defendant on a trial for larceny was unreasonable. The same court said in *Meredeth v. People*, 84 Ill. 480, that the argument of a cause was as much a part of the trial as the taking of evidence. In *People v. Keenan*, 13 Cal. 581, the defendant was tried upon an indictment for murder, and the trial court limited his counsel to a speech of an hour and a half, and to this action of the court an exception was taken; at the expiration of the hour and a half the prisoner's counsel applied for an extension of the time, so as to enable him to finish his argument to the jury, but his application was refused, and he again excepted. The case was one depending on circumstantial testimony. The Supreme Court reversed the judgment of conviction, on account of such limitation of the time allowed for argument, and they say: "It is impossible to deny that if the constitutional privilege of being heard by counsel be allowed at all, it must be so admitted as that the prisoner may have the benefit of a complete discussion of all the matters of law and evidence embraced by the case." In *Hunt v. State*, 49 Ga. 285; s. c., 15 Am. Rep. 677, it was held that it was error upon a criminal trial to limit the prisoner's counsel to forty minutes. In *State v. Collins*, 70 N. C. 241; s. c., 16 Am. Rep. 771, it was decided that the presiding judge had the right to regulate the arguments by reasonable rules and limitations, and that restricting counsel upon the trial of an indictment for a capital felony to one hour and a half was not so unreasonable as to justify granting a new trial.

In *Dille v. State*, Ohio Supreme Court, April, 1879, it was held that the constitutional right of a person accused of a felony, "to appear and defend in person and with counsel," cannot be denied or its exercise unreasonably abridged; but the court may limit the argument of the accused or his counsel, provided the accused is not thereby deprived of a fair trial. So, where on the trial of one charged with a felony, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting, and the accused was defended by two counsel, who were limited by the court to thirty minutes in the argument to the jury, held, that this was an abuse of power which prevented a fair trial.

CASES
IN THE
SUPREME COURT
OF
OHIO.

FINCH V. BOARD OF EDUCATION.

(30 Ohio St. 37.)

Board of education — liability for negligence.

A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability.*

ACTION for damages for personal injuries. The opinion states the case.

Haynes & Potter, for plaintiff in error.

C. H. Scribner, for defendant in error.

ASHBURN, J. This case was disposed of in the Court of Common Pleas on the general demurrer to the reply to the answer.

The demurrer was treated in that court, and has been argued here, as a demurrer to the petition. We will consider it in that light.

* See *Hill v. Boston* (132 Mass. 344), 23 Am. Rep. 338.

On the demurrer being sustained, plaintiff took the case on petition in error to the District Court. By that court the case was reserved for decision in the Supreme Court.

The ruling error assigned is that the Court of Common Pleas erred in sustaining the demurrer.

The question presented on the record is whether the board of education of the city of Toledo, as a corporation, is liable in damages to a scholar, lawfully attending one of the common schools therein, for injuries resulting to such scholar, without its negligence, from the alleged negligence of defendant in the construction and maintenance of the school building where the scholar was in rightful attendance.

By the demurrer all facts well pleaded are admitted to be true. Not so, conclusions the pleader has drawn from the statutes, as facts. Will the admitted facts sustain an action against defendant?

By article 6 of the State Constitution the State is charged with the duty of providing and maintaining a system of common schools for and throughout the State. In obedience to this constitutional mandate the general assembly, in 1853, passed an act, "to provide for the reorganization, supervision and maintenance of common schools." By its command, each and every organized township in the State is made a school district for all purposes connected with the general interest of education in the township. The general management and control of the common schools, in each of these political divisions of the State, is confided to a body styled a board of education. The constituent elements composing this board are the township clerk and that director of a sub-district who is appointed clerk of the sub-district. This body, and its successors in office, are declared to be a body politic and corporate in law, with capacity to sue and be sued, etc. The purpose of this is to give the common school system uniformity, harmony, unity, and force throughout the State.

It is provided in this act, that cities and villages authorized by special acts to elect their own boards of education shall have the exclusive management of their own public schools. By section 67, the Akron school act and amendments together with all other acts, creating or authorizing special school districts, are continued in force. But all such school organizations are parts of the general common-school system of the State. The provisions of the statute preserving their autonomy clearly manifests such intention.

The school boards and other officers in all special school districts are required by section 67 to make annual reports, such as are required of township boards and other officers. They reach their respective shares of the general common school fund only, "on the order of the auditor of the proper county," who is expressly forbidden to issue such order, "unless the local treasurer, clerk, recorder or secretary of such board or other school officer" has deposited with the auditor the annual "abstract of the enumeration of scholars," etc., "as required by the act of 1853, of teachers, local directors, and boards of education in townships."

Keeping in mind that the common schools in the State, whether located in city, village, or county, are the fruit of the Constitution, constituting a general educational system, and providing for the organization, maintenance, and unification of common schools in Ohio, we will examine the claim of the plaintiff and liability of defendant.

Plaintiff claims substantially that defendant is a corporation, municipal in its character, so created by statute for the benefit of the city of Toledo, presumably at its request, and conferring upon the inhabitants of that city other and greater powers and privileges than upon the inhabitants at large; that it has power to raise and control the corporate and other school funds raised to carry out and defray the expenses of the common-school system of Toledo; and hence responsible in damages for private injury resulting from corporate negligence.

Defendant controverts this claim of its power and liability.

The city of Toledo was constituted a separate school district by an act passed March 9, 1849 (47 Ohio L. 207), extending the Akron school law to Toledo. The adopting act having some provisions in it inconsistent with the Akron act, to that extent the Akron statute did not apply to Toledo. April 2, 1866 (63 Ohio L. 200), an act was passed amending and supplementary to the act of March 9, 1849. By it sections 9 and 10, providing for the levy of taxes and their expenditures, were repealed, and supplied by sections one, two and three of the repealing act. As a distinct provision for taxation was made in the Toledo acts of 1866, it necessarily superseded section seven of the Akron act of February 8, 1847, upon the same subject. The two provisions were inconsistent, and both could not be in force in Toledo.

Section one of the act of April 2, 1866, limits the levy for school-

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houses and sites to one mill on the dollar. Section two limits the annual levy for school purposes to four mills on the dollar. Section three allows an increased levy for the purchase, improvement, or building purposes, when, in the opinion of the board of education, the necessities of the schools under its charge "require the immediate enlargement, or purchase, or improvement of a site or sites, or the erection or enlargement of a school-house or school-houses, involving a required expenditure, in any one year, greater in amount than would accrue and be available for such purpose." Under the first section this necessitous levy is limited to two mills on the dollar, and is ordered to cease when the necessity no longer exists. Section four requires these levies to be certified to the *county auditor*, to be placed in consolidated form upon the general tax duplicate, to be collected as other taxes. These levies, when collected, were to be paid to the treasurer of the board of education; but, by reason of the requirements of section 67 of the common school act of 1853, no order was authorized to be drawn in favor of such treasurer until certain requirements of the school officers of all special school districts have been complied with.

Counsel for plaintiff claim that section seven of the Akron school statute was in force in Toledo at the date of the alleged injury, "making defendant a corporation full and complete, and gives it full control of the corporate funds, including those raised to defray all the expenses of said school system." This claim is not founded on the true condition of the law.

The original section seven of the Akron school law required the Akron school board to report to the *town council of Akron* "the amount of money necessary to be raised in *addition* to the money accruing to said town under the general school laws of the State, to defray all other expenses of said school system during the current year." Upon receiving this report from the Akron board of education, the *town council* was required to make the necessary levy, etc. The act of January 28, 1841 (Ohio, 1862, p. 33), amended the original Akron statute. Section 1 limits the levy of the tax to be thereafter "assessed to defray the expenses of the school system" to four mills, in any one year, on the "dollar of the taxable property" in the town of Akron. Section 3 requires the "board of education to make known to the auditor of the county of *Summit* the amount of tax which they may want levied for school purposes during the current year," etc. Section 4

repeals so much of the amended act as is in conflict with this repealing act.

From this it appears that the city of Akron and the city of Toledo each have a statute governing and controlling the action of their respective boards of education, touching the levy of tax assessments, the amount of the levy and the purpose thereof. Whatever may be the liability of the corporation, known as the board of education of Akron, for negligence under statutes affecting it, we are quite certain that section seven of the Akron school law in no way affects the power or liability of the board of education of the city of Toledo.

The board of education of Toledo is a corporation to a qualified extent, capable of contracting and being contracted with, within the limits of the express grants of power given to it, or arising to it, by necessary implication; it may sue and be sued to enforce its contracts, and be compelled, by legal process, to comply with all its legal obligations. It is a corporation of a public nature, and charged with the performance of public duties. By the second section of the Akron act, it is "authorized to receive all moneys accruing to said town, or any part thereof, for use and benefit of the *common schools* in Toledo." It is also made capable of receiving any gift, grant, donation, or devise made for the use of the *common schools* of the city.

Section eight provides that "all legal titles" to lands and houses and other property used for *common school* purposes in Akron (Toledo) shall vest in the town council of Akron (Toledo), at the taking effect of this act, and all titles acquired thereafter shall be in the name of the town council, with power to sell, lease, and convey any and all the lands, etc., and to purchase other lands and tenements, etc., by and with the advice of the board of education, but not otherwise. This gives the city council possession of, and control over, all the school property belonging to the school district. The board of education has no legal control or power over such property; it can veto the action of the city council when it does not approve. It has no other property right.

It is provided in sec. 43, act of 1853 (S. & C. 1361), that the school-house lot, not exceeding four acres, appropriated to common school purposes, upon which a school-house has been erected, and is occupied for the accommodation of a common school of any grade, in the usual manner, from time to time, by whomsoever the

legal title may be held or vested, is exempted from sale on execution. Neither courts, boards, nor town councils, can subject such school property to the payment of damages resulting to a private person from the negligence of defendant.

We have wholly failed to find any provision of the school law, general or special, creating or implying the liability of defendant in this class of cases. No possible means appears, in the school laws, by which defendant, if liable for a tort, could provide a fund out of which to satisfy a judgment against it.

An examination of the nature and power of such *quasi* corporations will furnish a reason sufficient why defendant is not liable.

Text writers say: "Civil corporations are of different grades or classes, but in essence and nature they must all be regarded as public. The school district, or road district, is invested with a corporate character, the better to perform, within and for the locality, its special function, which is indicated by its name. It is but an instrumentality of the State, and the State incorporates it, that it may the more effectually discharge its appropriate duty; so with counties." 1 Dill. on Mun. Corp., § 10.

City and village school districts constitute a part of the State policy in promoting and fostering common schools, and have become State agencies in the school system of education contemplated in the Constitution. The laws creating them, or authorizing such organizations prior to the adoption of the present Constitution, are continued in force by the statute of March 14, 1853, and retain, in this way, their authority, and incur the liabilities to which they are subjected. Owing to the very limited number of corporate powers conferred on them, boards of education rank low in the grade of corporate existence, and hence are properly denominated *quasi* corporations. This designation distinguishes this grade of corporations from municipal corporations, such as cities and towns acting under charters or incorporating statutes, which are vested with more extended powers and a larger measure of corporate life. This superior grade, from the nature of their organization, benefits received, and power to raise needed funds, are held responsible, by the common law, for private personal injuries caused by their own negligence or that of their servants, whilst the inferior grade of public *quasi* corporations are liable for damages resulting from their negligence, only where made so by express

legislation. This grade includes the defendant. It possesses but limited powers and small corporate life. A corporation in some sense political, but in no sense a municipal corporation.

The duty defendant owes the municipal corporation of the city of Toledo is a public and not a private duty. The fund that it is authorized to levy upon the property of the school district is a trust fund, devoted by law to educational purposes only. It can order an assessment within certain boundaries, as one of the public agencies of the State for the maintenance of public schools within that limit, which assessment cannot be lawfully directed to any other use.

Whether we consider the language of the statutes affecting this question of liability of defendant, applying to them the rules of construction indicated by the very narrow range of objects and purposes in the organization of defendant as a corporation, or looking to the general policy of our State common-school system, we are of opinion no action, sounding in tort, was ever contemplated.

Having already concluded that defendant, as a *quasi* corporation, is a public agent employed in administering the common-school system of this State, there is no principle of common law by which this action can be supported. On this point the principle settled in the case of *The Board of Commissioners of Hamilton County v. J. W. Mighels*, 7 Ohio St. 109, fully exonerates the defendant as a *quasi* corporation from common-law liability. That case, and the principle settled in it, are fully supported by numerous English and American cases.

To show a disposition in the highest English courts to enlarge the liabilities of corporations, counsel for plaintiff cite the cases of *Mersey Docks v. Gibbs*, and *Mersey Docks v. Pierce*, 11 H. of L. Cas. 686. We do not perceive such tendency in these cases. The docks were placed in charge of a body of trustees, with power to collect tolls for their use to and close them for cleansing and repair. By statute of 51 Geo. III, they were clothed with power to appoint water-bailiffs to remove wrecks and other obstructions, to pay for this out of dock rates collected from vessels. A bank of mud was allowed to accumulate in the approach to the docks. The "Sierra Nevada," in attempting to reach the docks with a cargo of guano, foundered in the accumulated mud, so that the water and mud entered the vessel and damaged the cargo. The Docks was a cor-

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poration, created by statute, and the surplus funds collected went to public uses. Suits in these cases were brought to recover damages for negligence. The House of Lords held the corporation liable, and directed that the liability thus incurred should be discharged from rates received from vessels, and from which fund dock repairs were paid. This ruling was in harmony with the general doctrine; first, because it was the duty of that corporation to keep the docks in repair out of the tolls, and second, because, keeping the approaches to the docks navigable was necessary to the proper use of the docks and due to customs.

To maintain plaintiff's action, her counsel confessedly rely mainly on the case of *The City of Dayton v. Pease*, 4 Ohio St. 80. The cases are not alike in fact or principle. That was an action against a strictly municipal corporation for injuries to a third person, resulting from the negligence of subordinate officers acting under the authority of the municipal corporation, in which case was applied the maxim of *respondeat superior*, etc. Dayton was incorporated for the immediate benefit of its inhabitants, with considerable legislative power, directing a municipal government for its own pleasure, benefit and emolument, with power to provide a fund to meet and satisfy damages for its own wrongs, or injuries arising from the negligence of its servants. This defendant is but a *quasi* corporation of inferior grade, acting for the public as one of the State's ministerial educational agencies, with power to levy taxes for school and school building purposes, and no other. It was a public school agent in the city of Toledo in the same sense that a township board of education is a public school agent in a township.

The case of *Bigelow v. Inhabitants of Randolph*, 14 Gray, 541, is in point. The town of Randolph, by a vote, assumed the duties of school districts, purchased a lot and erected thereon a school-house for the schools of the town. An excavation about eight feet deep was made in the lot with the knowledge of defendants, and remained so for about eighteen months prior to the alleged injury. Plaintiff was a pupil of one of the schools, and while at play on the lot with her school companions, without fault on her part, fell into the excavation and was injured. This suit was brought to recover damages for the alleged injury resulting from the negligence of defendants in the matter of the excavation on the school lot. Defendants' legal liability was the question involved. The court held, that "a town which has assumed the duties of school districts

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is not liable for an injury sustained by a scholar attending the public school from a dangerous excavation in the school-house yard owing to the negligence of the town officers."

In his opinion, METCALFE, J., said: "The question then is whether the defendants are answerable on the facts in this case, for the special injury sustained by the plaintiff through their neglect to provide a safe place for her attendance at school. We are of opinion that they are not. The wrong which the facts show was not malfeasance, but mere neglect of that kind of corporate duty for neglect of which, as we have seen, a town is liable to a private action only when it is given by statute."

We add, the demurrer admits facts which show mere neglect of that kind of corporate duty for neglect of which boards of education are liable to a private action only when it is expressly given by statute.

Judgment of the Court of Common Pleas is affirmed, and the cause remanded to that court for execution.

Judgment affirmed.

 AMERICAN TRACT SOCIETY V. ATWATER.

(30 Ohio St. 77.)

Will—bequest for religious use—uncertainty.

A testator makes a bequest in trust for the benefit of his parents during their lives, and proceeds: "It is my will and desire that upon the death of both of my said parents the trust shall expire, and my said trustees shall distribute the funds as follows, to wit: As to the remaining sum of three thousand dollars, the balance of said trust fund, my said trustee is directed to apply the same so that it may be used *for the interests of religion, and for the advancement of the kingdom of Christ in the world*, as follows, to wit: "He shall pay to the treasurer of the American Tract Society the sum of one thousand dollars; to the treasurer of the American Bible Society the sum of five hundred dollars; to the treasurer of the society known as the American and Foreign Christian Union the sum of five hundred dollars and to the treasurer of the American Home Missionary the sum of one thousand dollars." *Held*, 1. The trust created by the will ceases upon the death of the parents, and payment of the money to the societies whose treasurers are named. 2. The societies are the beneficiaries of the will, and the bequest is not void for uncertainty. 3. The object of the testator being to advance Christ's kingdom, the societies named are specified as the means by which to accomplish his object. 4. An unincorporated society is capable of receiving a bequest of personalty, not amounting to a trust.

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SUIT for a legacy. The will created a trust for the benefit of testator's parents, and then provided :

"*Item second.* It is my will and desire that upon the death of both my said parents the trust shall expire, and my said trustees shall distribute the fund as follows, to wit: The sum of two thousand dollars he shall pay to my said two sisters, Belinda and Aurelia, for their joint maintenance, to belong to them or the survivor of them, and to be at their entire disposal and control; and the receipt of my said two sisters, or the survivor of them, shall be a sufficient voucher to my said trustees for the said sum of two thousand dollars.

"As to the remaining sum of three thousand dollars, the balance of said trust fund, my said trustee is directed to apply the same so that it may be used *for the interests of religion, and for the advancement of the kingdom of Christ in the world*, as follows, to wit: He shall pay to the treasurer of the American Tract Society the sum of one thousand dollars; to the treasurer of the American Bible Society the sum of five hundred dollars; to the treasurer of the society known as the American and Foreign Christian Union the sum of five hundred dollars; and to the treasurer of the American Home Missionary the sum of one thousand dollars."

The trial court held the trust void for uncertainty as to the societies.

Henry F. Paige, for plaintiffs in error.

P. C. Smith and Harrison, Olds & Marsh, for defendant in error. A gift to a charity is maintainable if made to a competent trustee, and if so defined that it can be executed as made by the donor by a judicial decree. *Beekman v. Bonsor*, 23 N. Y. 310; *Phelps, Ex. v. Pond*, id. 77; *Williams v. Williams*, 4 Seld. (N. Y.) 548; *Ommanney v. Butcher*, 1 Turner & Russ. 270; *Morice v. Bishop of Durham*, 10 Ves. 539; 9 id. 399; *Baker v. Sutton*, 1 Keene, 253; *Brown v. Yeall*, 7 Ves. 50; *Ellis v. Selby*, 1 Mylne & Craig, 286; *Williams v. Kershall*, id. 293; 2 Redfield on Wills, 830; *Fowler v. Garlike*, 1 Russ. & Milne, 232; *Story's Eq. Jur.* 979; *Bascom v. Albertson*, 34 N. Y. 584; *Levy v. Levy*, 33 id. 97; *White v. Fisk*, 22 Conn. 81; *Holland v. Peck*, 2 Iredell's Eq. 255; *Bridges v. Pleasants*, 4 Ired. (N. C.) 26; *White v. University*, id. 21.

WRIGHT, J. The question at issue is as to the validity of the

bequest to the treasurer of the American Bible Society and others, as set forth in item second of the will. The Court of Common Pleas seems to have held that it was a bequest in trust, and as such, was void for uncertainty.

The alleged uncertainty is said to exist in this. In the opinion of men, the modes and methods of advancing the kingdom of Christ are as various as the numerous sects ostensibly engaged in accomplishing that object. While all are busy in the work, no two agree how it shall be done. Methodist, Episcopalian, Baptist, Presbyterian, all have their different opinions as to the matter which seems to have been contemplated by the testator.

That it is not within the province of a court of equity to decide between such conflicting claims will be at once conceded, and if the validity of this bequest depended upon the solution of questions such as these, the difficulty of sustaining the will becomes apparent.

If this instrument devised property to a named trustee, "to be used for the interest of religion and the advancement of Christ's kingdom in the world," it would perhaps be impossible to sustain such a disposition under the law of devises to charitable uses. In what has been called by courts the "wilderness of cases" upon this subject, we find that a bequest of this kind must be certain.

In *Chamberlain v. Stearns*, 111 Mass. 267, a devise for "benevolent" purposes was held void, because too general in its meaning. In *Holland v. Peck*, 2 Ired. Eq. 255, executors were directed to "pay over and deliver * * * for the benefit of the Methodist Episcopal church in America," * * * the sum of \$5,000, "to be disposed of by conference, or the different members composing the same, as they shall in their godly wisdom judge will be most expedient or beneficial for the increase or prosperity of the gospel." It was held: "The object of the bequest being of so indefinite a nature that the court cannot determine how it should be employed, the same is void."

In Wisconsin the statute with regard to trusts to uses provides that the trust must be "fully expressed and clearly defined on the face of the instrument creating it," which is merely declaratory of the existing law on the subject. In that State the case of *Ruth v. Oberbrunner*, 40 Wis. 238, holds that a devise of land to A and B, "to hold the same in trust for the use and benefit of the Order of St. Dominican and St. Catharine's Female Academy, and for no other purpose," cannot be sustained for want of certainty.

In *Heiss, Ex'r, v. Murphy*, 40 Wis. 276, a will devising property "to the Roman Catholic orphans" of a certain diocese, with a further provision appointing the Roman Catholic bishop executor, and giving him "power to sell the above property and use the proceeds for the benefit of the Roman Catholic orphans," was held void for uncertainty in the description of the beneficiaries, the class not being sufficiently defined, and no way being provided for selecting the *individual* beneficiaries from any class.

The court thus illustrate the uncertainty which they hold to invalidate the devise: "Conceding that the fund was to be used by the executor for the benefit of the Roman Catholic orphans of the diocese of La Crosse, how is it possible to ascertain and determine what orphans were intended to be benefited? Are they whole orphans or half orphans? Are they orphans of parents both of whom were members of the Roman Catholic church, or will an orphan of a Roman Catholic father, or of a Roman Catholic mother, come within the designated class? Are the objects of this charity the full orphans or half orphans who were living within the diocese at the death of the testator, or will such of either class as may thereafter come into the diocese be entitled to take as beneficiaries? Again, upon what principle or in what manner is the fund created by the sale of the real estate to be expended? Is the executor or trustee to apportion it equally among the orphans of the diocese when it is ascertained who are entitled to take, or is he to dispense it in his discretion for the benefit of such orphans as he may select from time to time? These questions suggest the perplexity which the court must encounter in carrying into effect this trust. It seems to us they are insuperable. For the testator has failed to declare his purpose, but has left his will so indefinite and vague upon all these material matters that a court, in order to execute the trust, is of necessity compelled to make a will for him. The words of COMSTOCK, C. J., in *Beekman v. Bonsor*, 23 N. Y. 298, may well be used: 'Here is a fatal uncertainty both as to the subject and object of the bequest.'" Page 306.

The opinion in *Grimes' Ex'r v. Harmon*, 35 Ind. 198; 9 Am. Rep. 690, is able and learned. We quote part of the syllabus:

"The residuary clause of a will was as follows: 'Item. I give and bequeath the residue of my estate, after the foregoing bequests have been fully paid to the orthodox protestant clergymen of

Delphi, and their successors, to be expended in the education of colored children, both male and female, in such way and manner as they may deem best, of which a majority of them shall determine.' In a suit by the heirs at law against the executors to recover the residuary estate :

" *Held*, (1) that the residuary clause was void for vagueness and uncertainty in the designation of the trustees and of the beneficiaries of the use ; and (2) that a court of equity had not the power to decree its execution *cy pres*."

In this case the court say : "Can the trustees execute the trust? Are the beneficiaries so described that they can be ascertained? And if they can be ascertained, is there any plan or scheme devised by the testator directing the manner in which and the purposes for which the money was to be expended? And if there is no plan or scheme, is there a discretion vested in the trustees authorizing them to select the beneficiaries and determine the manner in which the trust should be executed? The beneficiaries are not designated except by general vague and sweeping expression, 'colored children, both male and female.'"

After stating that the class thus specified number about four millions, the court proceeds to say: "It will be observed that no scheme or plan, such as the foundation of a college, a seminary of learning or a theological institute is prescribed. The character of the education to be given — whether moral, religious, literary, or scientific — is not prescribed. The purpose expressed is to promote the moral and religious improvement and well-being of the colored race by educating the colored children, both male and female, but the particular kind of education is not prescribed. It would be impracticable to distribute the fund ratably among the beneficiaries. There is no power or discretion lodged in any person, natural or artificial, to select the beneficiaries from the mass of children of the African race in this country. Can the courts, in the exercise of their functions, select the beneficiaries? If neither the trustees nor the courts can select the beneficiaries, is not the residuary devise and bequest void for uncertainty?" See, also, *Holmes v. Mead*, 52 N. Y. 332.

These illustrations are given to show the kind of devises or bequests that are held void by courts, and it is necessary to consider whether the bequest before us is of this character, and whether it is amenable to the objections that have been urged against it.

In our opinion the only rule necessary to be considered in this connection is that familiar one — that in construing a will we must endeavor to discover the intention of the testator. In the first place it is seen that he had already created a trust. That trust was to last during the lives of his parents. They being dead, he says it is his will that the trust shall cease. “It is my will and desire that upon the death of both my said parents the trust shall expire, and my said trustee shall distribute the fund.” The distribution is two thousand dollars to his sisters, and three thousand dollars to the various societies. It is therefore apparent that he intended all trusts with relation to this money to cease when distribution was made. The two sisters certainly hold their two thousand dollars clear of any complications of trust, and the same course of reasoning shows that the recipients of the three thousand dollars must hold their money free of any trust, at least so far as any trust is created by the will. If the money is taken by the societies subject to any trust at all, it is only such as exists by virtue of the objects and purposes of the society itself. All the means of the societies are devoted to the uses for which the societies are formed, and are thus, in a certain sense, held in trust to accomplish those uses.

The next clause to be considered is this: “As to the remaining sum of three thousand dollars, the balance of said trust fund, my said trustee is directed to apply the same so that it may be used for the interest of religion, and the advancement of the kingdom of Christ in the world, as follows, to wit: He shall pay to the treasurer of the American Tract Society the sum of one thousand dollars; to the treasurer of the American Bible Society the sum of five hundred dollars; to the treasurer of the society known as the American and Foreign Christian Union the sum of five hundred dollars; to the treasurer of the American Home Missionary Society the sum of one thousand dollars.”

It seems to us the intention of the will may be made clear by reading the above clause thus: As to the remaining sum of three thousand dollars, the balance of *said trust fund*, my said trustee is directed to apply the same so that it may be used for the interests of religion, and for the advancement of the kingdom of Christ in the world by paying to the treasurer of the American Tract Society one thousand dollars; to the treasurer of the American Bible Society the sum of five hundred dollars; to the treasurer of the

society known as the American and Foreign Christian Union the sum of five hundred dollars; and to the treasurer of the American Home Missionary Society the sum of one thousand dollars.

The testator conceives a scheme for advancing Christ's kingdom in the world. He carries out that scheme by directing the money to be paid to these various societies. As soon as the money arrives at their treasuries that scheme is accomplished. His will is fulfilled. No discretion is left to any one how this scheme shall be carried out. He has settled all that for himself. He knows that these societies are doing that which he wishes, and that to achieve which this bequest is made. He knows that they are engaged in a work of advancing Christ's kingdom. It is not to the purpose that any one else may have doubts upon this subject. He does not. Knowing, therefore, that this is their mission, in order to aid it, he gives the money to them. In other words, they are the beneficiaries of the will, and its object is accomplished by paying the money to them. It is not necessary, as counsel claim, to show that these societies are actually engaged in the work of advancing Christ's kingdom. The testator has settled that question for himself, so far as to say that he proposes to advance Christ's kingdom. How? By paying his money to the Tract Society, and the others named, That is his method of doing what he desires, and so he wills.

It is not as though he bequeathed to a trustee, for the purpose of advancing the kingdom of Christ. He bequeaths to these societies, because they are advancing the kingdom, which is the precise object he wants to accomplish. He first states the object he wishes to effect, and then states how he proposes to effect it. He is willing to pay the money direct to them. To them he trusts that they will forward his cherished idea.

As said, the societies themselves are the direct beneficiaries of the trust, although if they should attempt to use their money for purposes altogether foreign to those for which they exist, doubtless they might be restrained to those purposes; not by reason of any thing in the will, but because they should be restrained to the purposes for which they were created.

In *Miller v. Teachout*, 24 Ohio St. 525, the syllabus is:

"A testator provided in his will that the residue of his estate, which consisted of personal property, after paying legacies, should be retained by his executor, and invested by him during the life of his wife for her use, and that at her death it should be appro-

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appropriated by the executor to the advancement of the Christian religion, and be applied in such manner as, in his judgment, would best promote the object named. The executor accepted the trust, and during his life and that of the widow the heir brought suit to annul the will for uncertainty as to the object of the trust. *Held*, That the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its definite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this State will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise."

The court say, page 533: "Although the power of the courts of this State, to devise a scheme for the application of a vague charity, may well be questioned, it does not follow that the testator cannot create an agency to charge it for him; and it may be regarded as settled, that where a testator, creating a trust to a charitable use, defines the intention of the trust, and invests the trustee with discretionary power over the application of his bounty to the objects or for the purposes intended, the bequest will not be held invalid so long as there is no obstacle to the exercise of the powers confided to the trustee, for the exercise of the power may relieve the bequest of all objections arising out of its vague and indefinite character."

In the case before us, the testator has created these societies an agency to carry out his scheme, he has given them power over the application of his bounty, and the exercise of that power relieves the bequest of all objections made on account of vagueness or uncertainty.

In *Board of Education of Fairfield Township v. Ladd, Admr.*, 26 Ohio St. 210, the syllabus is:

"A testator directed that, after the termination of a life-estate created by his will, his property should be sold, and the proceeds placed in the public school fund of a township named, and applied to the education of the youth of that township. After the making of the will, but before the death of the testator, the part of the township in which he resided was set off and made to form part of a new township. *Held*:

"1. That the primary object of the testator was to apply his property to the education of the youth of the township named, and that the reference to the public school fund of the township was

merely to indicate a means or instrumentality for administering the charity."

Item third of this will was:

"And ever being concerned for the prosperity and happiness of my country, and fully believing that the diffusion of light and science constitutes one of the most paramount of Christian duties, I hereby authorize my executor, or his successor, after the death of the afore-named legatees, to cause the whole of my property to be sold to the best advantage, and the proceeds thereof I wish to be placed in the public school fund of Fairfield township, and the same to be applied to the education of the youth of said township."

The court say: "Fairfield township, and the public school fund of that township, are only referred to as furnishing the means or instrumentality for reaching the intended objects of the testator's bounty." In the case before us, these societies are only the means through which the testator proposes to reach the end of advancing Christ's kingdom.

The court further say: "The primary object of the testator is to apply his property to the education of the youth of Fairfield township, and to accomplish this purpose, he expresses the wish that the proceeds be placed in the public school fund of that township." So, here, the object of the testator is to apply his property to the advancement of Christ's kingdom, and to accomplish this purpose, he expresses the wish that the money be placed in the treasuries of the societies he names. There is no vagueness or uncertainty whatever in the bequest.

Although the testator uses the names of the treasurers, this is only his mode of designating the societies to which he desires his money to go, and though one is an unincorporated society, it is entirely capable of taking a personal bequest; it might be different as to realty. *Waller v. Childs*, Ambl. 524; *Burr v. Smith*, 7 Vt. 241; *Owens v. Missionary Soc. of the M. E. Church*, 14 N. Y. 386.

In our opinion, therefore, the objections to this bequest are not sound, and it follows that the judgment of the Common Pleas and District Court, holding the bequests void, must be reversed.

Judgment of District Court reversed and cause remanded.

Judgment reversed.

LANNING V. CHRISTY.

(30 Ohio St. 115.)

Justification of libel — when ground of action.

An action will not lie for statements contained in an answer alleged to be libellous, if such statements were honestly made, without malice, and if they were relevant, believed by defendant to be true, and were made upon probable cause, and under advice of counsel.

ACTION for damages. The opinion states the case.

Hiram Skinner, for plaintiff in error.

White & Campbell, for defendant in error.

WRIGHT, J. The question at issue is this. In an answer, the party defending makes statements that, standing alone, would be a libel on the plaintiff. The pleading, however, avers that the allegations in question were made in good faith, without malice; that they were relevant, believed to be true, and there was probable cause for such belief; further, that the pleading was under the advice of counsel. Can an action for damages be predicated upon such a pleading?

The answer of Reuben Lanning set up such a defense; a demurrer to it being sustained, the court holds that that defense is not good in law.

It is perhaps difficult to determine the precise nature of the action before us, and whether it is an action for libel, or rather in the nature of an action to recover for malicious prosecution.

Townshend on Slander, section 220, says that "defamatory matter, published in or to a court of criminal jurisdiction, may constitute the wrong called 'malicious prosecution,' but never the wrong called slander or libel." There was a word called "calumny" in the civil law, which signified an unjust prosecution or defense of a suit, and the phrase is still said to be used in the courts of Scotland and the ecclesiastical and admiralty courts of England, though we do not find cases of the kind in the reports.

If this be an action in the nature of one for malicious prosecu-

tion, it is evident the petition is defective, in not averring the termination of the original suit, in which the answer complained of was filed.

This is a well-settled rule in that class of actions. 2 Greenl. on Ev., § 452. But if we consider it as an action for libel, it has often been laid down that proceedings in court are not to be made the ground of such an action. Townshend says, in reference to the right of appealing to civil tribunals: "Every one has the right, with or without reasonable cause for so doing, to prefer his complaint to them; and whatever he may allege in his pleading, as or in connection with his grounds of complaint, can never give a right of action for slander or libel. The immunity thus enjoyed by a party complaining extends also to a party defending. Whatever one may allege in his pleading, by way of defense to the charge brought against him, or by way of counter-charge, counter-claim, or set-off, can never give a right of action for slander or libel. The rule thus laid down has been doubted by some, and it has been said that if the tribunal to which the complaint be made has no jurisdiction of the subject-matter, or if the defamatory matter be irrelevant to the matter in hand, or if the party complaining or defending maliciously inserts defamatory matter in his pleading, that in such cases the party aggrieved may maintain his action for slander or libel. Notwithstanding the dicta to the contrary, we believe the better and prevailing opinion to be, that for any defamatory matter contained in a *pleading* in a court of civil jurisdiction no action for libel can be maintained. The power possessed by courts to strike out *scandalous* matter from the proceedings before them, and to punish as for a contempt, is considered a sufficient guarantee against the abuse of this privilege; but, whatever may be the reason, it seems certain that where there is a perversion of the right, the policy of the law steps in and controls the individual right of redress by action of libel." Section 221.

In *Hill v. Miles*, 9 N. H. 14, it is said: "An action for libel cannot be sustained for a proceeding before a court having jurisdiction of the subject-matter, if the process was instituted under a probable belief that the matter alleged was true, and with the intention of pursuing it according to the course of the court, even if the matter turns out to be wholly false. . . . It may well be questioned whether an action for libel could be sustained, under such circumstances, even if there was evidence of express ill will." *Kidder v. Parkhurst*, 3 Allen, 393; *Watson v. Moore*, 2 Cush. 133.

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Addison on Torts, p. 933, ch. 17, § 1, says: "An action for defamation will not lie for any thing sworn or stated in the course of a judicial proceeding before a court of competent jurisdiction."

There are many authorities which hold that statements made in the usual course of judicial proceedings, whether of witnesses, counsel, or otherwise, come under the head of communications called privileged, although it is at the same time said that, if these statements are false and malicious, they may lay the foundation of an action. *Perkins v. Mitchell*, 31 Barb. 461. Again in the syllabus in *Henderson v. Broomhead*, 4 H. & N. 569, is this: "No action lies against a party who, in the course of a cause, makes an affidavit in support of a summons taken out in such cause, which is scandalous, false and malicious, though the person scandalized and who complains is not a party to the cause." See *Hastings v. Lusk*, 22 Wend. 410.

In *Marsh v. Ellsworth*, 50 N. Y. 311, the court say: "The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings, reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with which they are used; but that such privilege does not extend to matter having no materiality or pertinency to such questions."

The authorities seem to be: some that what is said or written in the course of judicial proceedings is absolutely privileged, and no action can lie therefor; others are to the effect that the statements must at least be relevant to the issue in hand; others that they must not be false and malicious.

It is not necessary for us to consider the many difficult questions which might arise in cases other than the one before us. The answer we are considering upon this demurrer avers that the statements made, which were alleged to be scandalous, were honestly made, without malice; that they were relevant, believed to be true, with probable cause for such relief; and, further, that the statements were made upon the advice of counsel. Such an answer sets forth a good defense, and the court erred in sustaining a demurrer to it.

The judgment of the District Court and Common Pleas is reversed.

Judgment reversed.

TOWSLEY V. MOORE.

(30 Ohio St. 185)

Statute of frauds — contract for work for more than a year — completed.

Although an action cannot be maintained upon a verbal contract not to be performed within one year, yet when such contract has been fully performed by one party, the other having obtained its benefits, he cannot refuse to pay the reasonable value thereof.

T. agreed to work until coming of age, a period of six years or more, for M. Having performed the contract, T. may maintain an action of *quantum meruit* for his services.

Edward Oviatt, for plaintiff in error.

McKinney & Tibbals, for defendant in error.

WRIGHT, J. The demurrer to the reply and the case made in the bill of exceptions raises the question: When a contract for service has been made, which cannot be fully performed in a year, if the party proceeds and does the work, can the statute be plead as a bar to a demand for compensation?

In this case, Olive Towsley agreed to work from the time she was eleven until she was eighteen, a period considerably longer than one year. But having worked, having fully performed her part of the contract, can the defendant plead the statute, instead of paying her?

Although this statute was enacted ostensibly for the prevention of fraud and perjury, courts have often been careful to see that it should not, in its application, occasion fraud or wrong. Indeed there are cases which hold that the mere fact that the application of the statute would work a fraud is a sufficient reason why such application should be withheld. *Hidden v. Jordan*, 21 Cal. 92; *Sandfoss v. Jones*, 35 id. 481.

It is therefore said: "Where a verbal contract is completely executed by one party, the consideration can be recovered from the other, notwithstanding the statute of frauds, . . . and where a contract is within the statute, as being not to be performed within one year from the making, but has been fully performed on one side, whether within the year or not, the consideration of that

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performance, though by contract not payable until after the expiration of the year, may be recovered by action when the stipulated time arrives." Browne on Frauds, § 117. The same author says: "One who has rendered services in execution of a verbal contract, which, on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a *quantum meruit*." In speaking of this section Parsons says: "When a contract, originally within its provisions, has been entirely executed on one side, and nothing remains but the payment of the consideration, this may be recovered, notwithstanding the statute. But whether a recovery can be had on the original contract, or only on a *quantum meruit*, is not entirely clear upon the authorities. Upon principle, however, we should say that a recovery in such case can only be had upon a *quantum meruit*." 3 Pars. on Cont. 38.

In *Stone v. Dennison*, 13 Pick. 1, it is held: "The statute of frauds has no application to a contract which has been fully performed on both sides." It appeared that plaintiff sued defendant for the value of services rendered. The defense urged was that the boy came to work when he was fourteen years old, agreeing to remain until he was twenty-one, and for compensation defendant was to supply board, clothing and education, which he had done, thus performing the contract on his part. To this plaintiff said that the agreement was void, not being in writing and he therefore sought to recover on a *quantum meruit*, claiming that his services were worth more than he had agreed to and had in fact received. Here was a case of a contract which could not have been performed in one year, and clearly, while it remained executory, no action could be maintained upon it by either party. If defendant had turned plaintiff away from his service, an action could not have been maintained for damages in violating the agreement, as regards the part remaining unexecuted. So, if the boy had quit his work, the master would have had no remedy. But the contract has been completed upon both sides. The boy had worked until he was twenty-one, and the master had paid him all he had agreed to, and the question was whether the agreement could be disregarded and the plaintiff recover more than he had already received, upon the ground that his services were worth more.

In delivering the opinion, SHAW, C. J., says: "Take the common case of a laborer, entering into a contract with his employer, toward the close of a year, for another year's service, upon stipu-

lated terms. Should either party refuse to perform, the statute would prevent either party from bringing any action whereby to charge the other upon such contract. But it would be a very different question were the contract fulfilled on both sides by the performance of the services on the one part, and the payment of money on account, from time to time, on the other, equal to the amount of the stipulated wages. In case of the rise of wages within the year, and the consequent increased value of the services, could the laborer bring a *quantum meruit*, and recover more, or in case of the fall of labor and the diminished value of the services, could the employer bring money had and received and recover back part of the money advanced, on the ground that by the statute of frauds the original contract could not have been enforced? Such, we think, is not the true construction of the statute. We are of opinion that it has no application to executed contracts."

In *King v. Welcome*, 5 Gray, 41, the case was this: Plaintiff sued for work done. The amount and value of the services were not disputed, but defendant said there was a contract, not in writing, by which plaintiff was to work an entire year, beginning at a future day, and this contract he had broken by leaving the employment. Here the defendant endeavored to shelter himself under a contract, not only so far as executed, but also so far as it was still executory, that is, in its entirety. The contract was one falling within the statute, and the court therefore did not permit the defendant any benefit from it, though still recognizing the principle that in case of performance of such a contract, a recovery might be had, notwithstanding the statute. The court say: "In the case at bar, the plaintiff shows services rendered for the defendant and their reasonable value. The defendant, admitting the performance of the labor and its value, says the plaintiff ought not to recover, because he made an entire contract for a year, which he has not fulfilled. The plaintiff replies, that contract was for work for a year from a day future; it was within the statute; it was not in writing; it was not executed, and cannot be used in a court of law, either as the basis of an action, or to defeat a claim, otherwise just and reasonable."

The authorities in Massachusetts on this subject are not uniform. *Davenport v. Mason*, 15 Mass. 85; *Lapham v. Whipple*, 8 Metc. 59; *Marcy v. Marcy*, 9 Allen, 8; *Frary v. Sterling*, 99 Mass. 461; *Hill v. Hooper*, 1 Gray, 181.

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In *Souch v. Strawbridge*, 2 Man. Gr. & Scott, 808, TINDAL, C. J., says, although the remark may be criticised as *obiter*: "The meaning of (the statute) is, that no action shall be brought to recover damages in respect of the *non-performance* of such contracts as are therein referred to. It has no application to an action in the present form, founded upon an executed consideration." If this, indeed, be the true meaning, it goes far to relieve questions of this kind of their chief difficulties. It allows an action when the contract has been performed, but refuses it in cases of non-performance, making the distinction simply between executed and executory.

In *Shute v. Dorr*, 5 Wend. 204, plaintiff agreed to labor for defendant for five years. The term of service having been ended by mutual consent, suit was brought for the value of the services. The court held that though the contract was void under the statute, yet *quantum meruit* could be maintained for the service actually rendered.

In *Pierce v. Paine*, 28 Vt. 34, this subject is discussed by REDFIELD, C. J., in the following case. The plaintiff was to subscribe for fifty shares of stock and carry them for a year; after the year, to have the option to transfer them to defendant; and there were certain arrangements about dividing profits, which do not affect the particular question considered. The turning point of fact upon which Redfield bases his decision does not appear from the statement of facts, but may be gathered from the opinion, and is this: The shares were never transferred to defendant; he never accepted them, and was in nowise benefited by them. The head-note of the case is this: "If the agreement, for the non-performance of which an action is brought, was not to be performed within one year, no recovery can be had upon it, although that which formed the consideration of the agreement was to have been, or was paid or performed within that period; and no recovery can be had for or upon the consideration so paid or performed, unless it inured to the benefit of the defendant."

Redfield holds that there can be no recovery upon the contract for it was not to be performed in one year and was not in writing. His reasoning, however, goes to show, if the contract had been performed on one side and went to the benefit of defendant, defendant must respond for the value of that benefit. In such case, however, it is necessary to show that the consideration or benefit has come to defendant's use.

In citing the case of *Souch v. Strawbridge*, 2 C. B. 808, Redfield says: "In the American cases cited, and in one late English case, *Souch v. Strawbridge*, by TINDALL, C. J., it is said that to entitle the party to recover on his part performance within the year, when the other party was not bound to perform within the year, it must appear that the performance on the part of the plaintiff was accepted on the other side, or that it went to the benefit of the other side. And just here it seems to us comes the proper distinction. If the contract has been performed on one side in such manner that the performance goes to the benefit of the other party, whether this was done within the year or not, it undoubtedly lays the foundation of a recovery against the party benefited by such performance. But where the contract on the part of this party was not to be performed within one year from the time it was made, the recovery is not upon the contract, but upon the *quantum meruit* or *valebat*, or upon the money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party."

Redfield criticises the cases upon the subject which say that performing the contract takes it out of the statute. He insists that the contract is still within the statute, and no action can be maintained upon it; but performance having benefited defendant, he shall pay the fair value of that benefit. Perhaps the difference is a mere dispute as to the form of stating the same result.

CHRISTIANCY, J., in *Whipple v. Parker*, 29 Mich. 374, says: "But if the contract has been executed by the other party, and he has received the consideration and accepted its benefit, an action may be maintained against him for the benefit thus conferred — the money, property, or value thus appropriated by him; not, however, upon the contract, but upon the appropriate common counts in *assumpsit*, and upon the duty, promise or obligation springing from the property, money or benefit thus conferred by the plaintiff, and received and appropriated by the defendant."

In this case the contract was, that in consideration the plaintiff would procure the defendant to be admitted as a partner in a joint venture with one-fourth interest therein, and in the business to be carried on and the profits to be made by it, defendant would, at the end of three years, pay whatever the business was worth.

Doty v. Martin, 32 Mich. 462, was a bill in chancery to restrain a physician from practicing his profession at Maple Rapids and

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vicinity. Plaintiff had bought this practice, and paid defendant for it, upon the condition that he was not to resume his profession. Defendant violated this agreement and began business, averring that the agreement was void under the statute. The court held that the contract having been fully performed on both sides, the case was not affected by the statute.

The act of Michigan makes the contract "void." 29 Mich. 372. This is somewhat different from ours, which provides "that no action shall be brought." Under which it is held that the contract is not absolutely void. *Minns v. Morse*, 15 Ohio, 571.

In *Patten v. Hicks*, 43 Cal. 509, plaintiff had made a verbal contract with defendant to furnish logs to keep a saw-mill running for a period of two years, and furnished a large number. Suit was brought on the contract to recover the value of the logs so delivered. It was held that the contract was void under the statute, being verbal, and that plaintiff's remedy was a *quantum meruit* for the logs which had been furnished.

In *Moore v. Aldrich*, 25 Texas Suppl. 276, defendant obtained plaintiff's cattle upon a contract to keep them for several years, to receive one-fourth of the increase for his compensation. He converted the cattle to his own use, and relied on the statute of frauds to prevent the admission of testimony to show what the parol contract was. The court rather curtly dispose of the defense by saying: "The gist of the action was the conversion by the defendant to his use of the plaintiff's property, not the enforcement of a contract which was not to be performed in one year. The statute of frauds has no application to the case."

In *Swanzy v. Moore*, 22 Ill. 63, the syllabus is: "Executory contracts are avoided by the statute of frauds; executed contracts are not. If a laborer contracts verbally to work an entire year, he is entitled to the wages agreed upon, and to the same proportionate compensation, for any period of time he labors, for less than a year.

"A parol contract, which is required by the statute to be in writing, is as binding as any when performed, or while being performed."

Moore, the appellee, had worked for Swanzy, appellant, under a contract for a year, the year to begin at a future time. There was a question relating to Moore having abandoned his contract before the time was up, but this is entirely independent of the defense arising

upon the statute of frauds. The court says: "This work was done under a contract void by the statute of frauds, and the question is whether Swanzey could insist upon the violation of the terms of such a contract as a defense to the action. Upon this there can be no reason to doubt, when the character of such a contract is considered. It will be found that executory contracts only are avoided by the statute of frauds; executed contracts never. A parol contract, which that statute requires to be in writing, is as good as any when performed, or while being performed or when partly performed so far as the performance goes. Suppose this man had worked the whole year, no one will deny that he would be entitled to the wages fixed by the contract, and no more. The same measure of compensation must satisfy him for the time he did the work. Suppose he had agreed to work five years for Swanzey for nothing, but just for the love of it, while he would not be bound to work a day under such a contract, yet if he worked six months or a year under it, he would have to be content with the pleasure of the exercise for his compensation. Here was a contract that he should work a year for so much money. Till that service was performed he was entitled to no pay. Whatever he did under that contract must be controlled by its terms. He worked a portion of the time, and quit without cause. By the terms of the contract under which he did the work he is entitled to no pay. While he agreed to work for nothing, he cannot change his mind and go for a *quantum meruit*. He was not bound to work under the contract a single day longer than he pleased. Swanzey could not sue him for a violation of his contract, which was obnoxious to the statute of frauds. While executory, either party might repudiate it. When executed, or so far as executed, it was as valid and binding as if it had been in writing."

We confess this case, as well as some of the others cited, seems to play fast and loose with both the contract and statute. While insisting that the agreement is void, it still allows a recovery according to its terms for the labor that was performed. It is much more intelligible to say, that though the contract is void, the party must pay for such advantage as he has received, according to the plainest principles of equity. As Redfield says, in *Sherman v. Champlain Transportation Co.*, 31 Vt. 182: "It is certain, I think, in regard to a case of this character, where the obligation on one part depends upon a use conceded on the other part, that

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even when the contract in terms extends beyond one year, it is not competent for the party, who has acquiesced in the receipt of such use for a succession of years, to successfully defend against an action for the compensation stipulated. And whether the recovery is put upon the ground that whatever is received by one party in performance of a contract, which he elects to avoid on the ground of the statute, he must pay for, or that by acquiescing in the receipt of such use, year after year, he did, *toties quoties*, renew the contract, does not seem very material. In any view we can take of the case, it is obvious the statute of frauds can have no application." See, also, *Suggett's Admr. v. Cason's Admr.*, 26 Mo. 221.

In *Emery v. Smith*, 46 N. H. 151, it is held that in cases like this no action can be maintained on the contract, but a *quantum meruit* must be resorted to; and it is further held that the agreement is not admissible to affect the amount of damages. *Green v. Saddington*, 7 El. & Bl. 503; *Lane v. Shackford*, 5 N. H. 130; *Thomas v. Dickinson*, 14 Barb. 90; *McCue v. Smith*, 9 Minn. 252; *Watrous v. Chalker*, 7 Conn. 224; *Ray v. Young*, 13 Tex. 550; *Noyes v. Moor*, 1 Root, 142.

In *Randall v. Turner*, 17 Ohio St. 262, the syllabus is: "A verbal agreement for the sale of lands, which has been fully performed on the part of the vendor, is not rendered void by the statute of frauds."

Samuel Turner, defendant in error, plaintiff below, had sold land to George Turner and John Randall for \$800; \$400 was paid and the property conveyed. The suit was for the other \$400. DAY, J., says: "The suit being for the purchase-money of the land, and the contract having been fully performed on the part of the vendor, the statute did not apply." The reason is sufficiently palpable. The party who had received \$400 worth of land ought to pay \$400 in money.

Although not the turning point in the case, in *Abbot v. Inskip*, 29 Ohio St. 59, it is said: "It is true the agreement could not have been performed within a year from the making thereof, and therefore, under the statute of frauds, it could not have been enforced by action. It might, however, have been performed by the parties, and, when performed, the parties would have been bound by it, or if the plaintiff had performed, the defendant would have been bound to perform it on his part."

When courts say that performance takes a case out of the statute, or that where the contract has been fully completed on both sides, or where it has been completed on one side and payment alone remains, the statute has no application, it is only an artificial method of stating a very simple proposition. That is this: When one has received money, goods, or benefits from another, justice and equity demand that he should pay therefor, and the law will, if necessary, imply a promise to that effect. And although such benefits may have been rendered under a void contract, or one that cannot be enforced, it cannot be allowed that a defendant can retain his advantage without compensation. This would be unconscionable. In the case before us plaintiff agreed to labor for defendant for board and clothing, and such sum as her services were reasonably worth. If this contract cannot be enforced by reason of the statute, the law can imply a promise precisely like it. The defendant has received the benefit of the services, whatever they were, and it would be a reproach to the law if he were permitted to retain these benefits without just payment.

Her cause of action is complete upon showing that she worked, and the value of her labor.

It is further objected that there can be no recovery in this case on any implied contract, because the express contract excludes the idea that one can be implied. The defendant thus defeats recovery on the express contract by means of the statute, and then uses that contract to defeat recovery also on any other that may be implied. The contract is thus made useful to the defendant, but not to the plaintiff for any purpose. If it cannot be of any avail to one party, it should not be to the other. It can hardly be a dead letter upon one side and not on both. The case in 19 Ohio St., where it is held that the express excludes the implied, was a case where the express was capable of enforcement.

In 2 Pars. on Cont. 515, it is said: "If the parties expressly provided not any thing different, but the very same thing which the law would have implied, now this provision may be regarded as made twice; by the parties and by the law. And as one of these is surplusage, that made by the parties is deemed to be so; and hence is derived another rule of construction, namely, that the expression of those things which the law implies works nothing." In the case before us the express contract was just what the law would imply, namely, reasonable reward for service performed,

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and under the rule stated by Parsons, this express contract may be regarded as out of the way.

A question is raised upon the statute of limitations. It is sufficient to say that when this statute is relied upon as a bar, it must be plead specially. *Sturges v. Burton*, 8 Ohio St. 215; *McKinney v. McKinney*, id. 423.

There was nothing in the answer pleading this statute, and there is no error in this regard.

Judgment of District Court reversed and that of Common Pleas affirmed.

ASHBURN, J., dissented.

THE MUTUAL LIFE INSURANCE CO. V. FRENCH.

(30 Ohio St. 240.)

Insurance — forfeiture — waiver.

A policy of life insurance contained the usual cause of forfeiture for non-payment of premiums. Departing from the strict rules of the company, a duly authorized agent had allowed the cash part of the premium to be paid one-half cash, the other half by a short note. Upon the 6th of July, 1867, the day the premium was due, the agent received the check of assured for the half cash due, and a six months note, giving the renewal receipt for a year. The note contained the clause "if not paid at maturity said policy is to be null and void." Neither check nor note was paid. *Held*, (1) The mere fact that the note was not paid at maturity, did not of itself avoid the policy. It gave the insurance company the option of declaring a forfeiture, but this option must be asserted by clear and unequivocal acts. The clause of forfeiture, being inserted in the note for the benefit of the company, may be waived by failure to act, or other circumstances evincing an intention not to claim the benefit of the stipulation. Whether the company has exercised such option, or waived their rights, is a question of fact for the jury, under all the circumstances of the case. (2) The assured is entitled to a renewal, upon tendering at the proper time the proper amount of premium due. This amount does not include interest on premium notes previously given, where the policy does not provide for its forfeiture by reason of non-payment of such interest.

ACTION on a policy of insurance. The opinion states the facts *Sage & Hinkle*, for plaintiff in error. I. French was bound to

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tender the premium stipulated in the policy; or an amount which, with the credits, would certainly be equal to the premium. 2 Chitty on Cont. (11th Am. ed.) 1188; *Dixon v. Clark*, 5 Man. Gr. & Scott, 377; *Boyden v. Moore*, 5 Mass. 365; *Brandt v. Railroad*, 26 Iowa, 114; *Smith v. Keels*, 15 Rich. 318; 2 Pars. on Cont. 640; *Bassett v. Prior of St. Johns, etc.*, M. 2. H. 6, fo. 4 pl. 1, cited in Chitty on Cont. (11th Am. ed.) 1188; *Mowry v. Kirk*, 19 Ohio St. 375; *Bernhard v. Ins. Co.*, 5 Bigelow, 144.

II. The policy was forfeited by failure to pay the note given for half the premium. *Robert v. Ins. Co.*, 1 Dis. 355; *Baker v. Ins. Co.*, 43 N. Y. 283; *Pitt v. Ins. Co.*, 100 Mass. 500; *McAllister v. Ins. Co.*, 101 id. 558; *Ins. Co. v. Hasbrooks*, 32 Ind. 447; *Patch v. Ins. Co.*, 44 Vt. 481; *Thompson v. Ins. Co.*, 5 Bigelow, 8; *Russum v. Ins. Co.*, 5 id. 243; *Ins. Co. v. Grigsby*, 10 Bush, 310; *Anderson v. Ins. Co.*, 5 Bigelow, 527; *Ins. Co. v. McMillen*, 24 Ohio St. 82; *Skinner v. Dayton*, 2 Johns. Ch. 526-535; *Hutcheson v. McNutt*, 1 Ohio, 14, 20; Story's Eq. Jur., § 1313 *et seq.*; *Boyd v. Talbert*, 12 Ohio, 212; *Smith v. Whitbeck*, 13 Ohio St. 471; *N. Y. L. Ins. Co. v. Statham*, 3 Otto, 30.

Hoadly, Johnson & Colston, for defendants in error.

WRIGHT, J. The petition is upon a policy of insurance upon the life of Maynard French, for \$10,000. The policy was executed July 6, 1864. It is alleged that the annual premiums for 1865, 1866 and 1867 were duly paid, and receipts taken. That upon July 6, 1868, and before noon of the proper day, the premium was duly tendered for the ensuing year, and refused. In April, 1869, Maynard French died. The policy was for the benefit of Julia A., wife of Maynard French. She, however, died before her husband, and this suit is by her children and heirs.

The second and third paragraphs of the answer are as follows:

"*Second.* Defendants deny that the annual premium upon the policy referred to in the petition, for the year 1867, was duly paid. They admit that on the sixth day of July, A. D. 1867, a receipt for said premium was given by the agent of the defendants at Cincinnati, to the said Maynard French, but no payment was made. Said French gave to said agent for said receipt his check upon the Fourth National Bank of Cincinnati, dated July 25, 1867, for

\$213 88-100, and his note for \$213 87-100, payable six months after date, to the order of the defendants, with interest, and with the stipulation expressed in said note that it was given for said premium, and that if not paid at maturity said policy should be null and void, and he also gave his due bill for \$1,450, unpaid part of premium on said policy, with interest at six per cent, payable annually, and with the stipulation that the same should be a lien on said policy till paid; and said receipt was given to said Maynard French upon the understanding and agreement that the same was not to be operative unless said check and said note for \$213 87-100 were paid at maturity, and no part of either has ever been paid. Defendants further say that the taking said check and note, and giving said receipt therefor by said agent was without the knowledge, authority or consent of the defendants; that by the terms of said policy the annual premium thereupon was to be paid on or before twelve o'clock m., on the 6th day of July, during its continuance, and that said agent was authorized to receive said premiums, when due, but was expressly prohibited from altering or discharging any of the stipulations of said policy, and that said prohibition was noted on the face of said policy. Defendants further say that as soon as they were advised of said acts and doings by their said agent, they disavowed the same, and refused to recognize, and have ever since refused to recognize said policy as in force, of all which said Maynard French was, without delay, notified.

"*Third.* Defendants deny that payment of the annual premium on said policy accruing on the 6th day of July, 1868, was tendered in manner and form as set forth in the petition or otherwise, and allege that no part of the same has ever been paid. And defendants further say that it is expressly stipulated in said policy that if the assured should not pay the annual premiums thereupon on or before the several days therein mentioned for the payment thereof, then, and in every such case, the defendants should not be liable to the payment of the sum insured, nor any part thereof, and said policy should cease and determine, and all previous payments made thereon, and all profits, should be forfeited to said company."

Upon the trial below verdict and judgment was had for plaintiffs in the sum of \$8,248.

The policy is numbered 25187, bears date July 6, 1864, and recites as its consideration: "The representations made to them in the application for this policy, and of the sum of \$725 to them in

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hand paid by Mrs. Julia A. French, wife of Maynard French, and of the annual premium of \$725 to be paid on or before twelve o'clock, M., on the 6th day of July, in every year during the continuance of this policy."

It contains the agreement of the assured that "in case the said assured shall not pay the said annual premiums, on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or, any part thereof, and this policy shall cease and determine; and . . . that in every case where this policy shall cease, or become or be null and void, all previous payments made thereon, and all profits, shall be forfeited to the said company."

By the rules of the company, this was a policy, on which the assured was allowed to pay one-half the premium in cash and to give a premium note for the other half. The insurance was effected at Cincinnati, with the agent of the company, Robert Simpson.

On the 6th of July, 1867, French not being able to pay the cash part of the premium, gave his check for one-half thereof, payable July 25th, his note of six months, and the usual premium note. The following are copies of these papers:

..... No. — CINCINNATI, July 25, 1867.
 Int. Rev. Stamp. 2 Cents. FOURTH NATIONAL BANK,
 No. 31 West Third St.
 Pay to R. Simpson, Esq., or order, two hundred and thirteen $\frac{88}{100}$ dollars.
 \$213.88. M. FRENCH, *Agt.*

..... \$213.87. CINCINNATI, July 6, 1867.
 Int. Rev. Stamp. 15 Cents. Six months after date, I promise to pay to the order of
 Mutual Benefit Life Insurance Company, two hundred
 and thirteen and $\frac{87}{100}$ dollars, being for premium on
 policy 25,187, and if not paid at maturity, said policy is to be null
 and void.

Value received, payable at Cincinnati, with interest at 7 per cent.

No. — Due —

M. FRENCH.

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"Exhibit J"

..... Policy No. 25,187. CINCINNATI, July 6, 1867.

Int. Rev.
Stamp.
2 Cents.

AGENCY AT CINCINNATI.

..... Due the Mutual Benefit Life Insurance Company,
fourteen hundred and fifty dollars, unpaid part of
premium of Policy No. 25,187, with interest at 6 per cent, payable
annually; this note being a lien on said policy till paid.

\$1,450.00.

M. FRENCH.

These amounts of \$213.88 are more than one-half the premium and are made by adding interest on the previous premium notes. It appears that Simpson had been in the habit of extending to French similar indulgence, in previous years, as he says "by express consent of the company," and upon receiving the foregoing documents, he gave to French the usual renewal receipt as follows:

..... THE MUTUAL BENEFIT LIFE INSURANCE CO.

Int. Rev.
Stamp.
2 Cents.

261 Broad St. NEWARK, N. Y., July 6, 1867.

..... Received seven hundred and twenty-five dollars, for
renewing Policy No. 25,187, on the life of Maynard
French for one year from date.

[Not valid unless countersigned by agent.]

\$725.00.

BENJ'N C. MILLER, *Treasurer.*

Countersigned, R. SIMPSON, *State Agent.*

NOTICE TO POLICY-HOLDERS. Unless premiums are paid on or before the day they become due, the policy is forfeited and void. Payments of premiums may be made to agents upon receipts issued by the company, signed by the treasurer and countersigned by the agent, and not otherwise. Agents are not authorized to make, alter or discharge contracts, or waive forfeitures, or grant permits. All premiums are due and payable at the company's office, in Newark, but if made to an agent on production by him of a receipt as above, it will be valid.

LEWIS C. GROVER, *President.*

The check was not paid upon July 25th, and is yet unpaid. The note has not been paid, and it is hence claimed that the policy has been forfeited and no recovery can be had upon it.

In most of the cases which have been cited in argument the

policy contained a clause, that it should be void upon non-payment of the premium; or any note given for such premium. This policy, however, contains no clause of avoidance for the non-payment of notes given for premium.

It is not insisted that the non-payment of the check alone forfeited the policy, but it is claimed that failure to pay the note does work out this result. It will be seen that the note stipulates in terms that, if it is "not paid at maturity, said policy is to be null and void."

It cannot be successfully maintained that this clause makes the policy absolutely void upon non-payment of the note. Under the authorities such a clause, being introduced for the benefit of the insurance company, means that the policy shall be void if the company insist upon it; but it is their option to say whether this result shall follow or not.

In *Bouton v. Am. Mut. Life Ins. Co.*, 25 Conn. 542, it is said: "As the policy provides that, in case the annual premium required by it should not be paid in advance as therein mentioned, the defendant should not be liable for the sum insured or any part thereof, and the policy should cease and determine, it was optional with the defendant to consider the policy as being at an end to all intents and purposes, in which case they would be absolved from all claim or liability therein; but as that provision was inserted for the sole benefit of the defendants, it was only voidable at their election, and that it was therefore competent for them to waive a strict compliance with it after the time stipulated for the payment of such premium."

This language is cited with approval in *Jacobs v. Mut. Life Ins. Co.*, 5 Big. 48, and the proposition is abundantly sustained by authority. *Wing v. Hervey*, 27 E. L. & Eq. 140; *Buckbee v. U. S. Ins. Annu. & Trust Co.*, 18 Barb. 541; *Sheldon v. Conn. Mut. Ins. Co.*, 25 Conn. 207; *Goit v. Nat. Prot. Ins. Co.*, 25 Barb. 189.

In the case before us, a duly authorized agent had delivered a renewal receipt, acknowledging payment of the premium for the year beginning July 6, 1867. He had taken at the time what appeared to him sufficient payment. That he had authority to do this must be inferred from the verdict of the jury. That he had such authority is shown by his own testimony, which states that he had done the same thing in previous years, "and each time by the express consent of the company."

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In the face of such a receipt, if the company are not allowed to dispute what it says, and deny that payment of the premium was made, it at least puts upon them all the burden of overthrowing the assertion they have thus made. If they choose to assert their option of forfeiting the policy, because the note was not paid, they must exercise that option with some degree of promptness, and in some unmistakable manner.

Have they done this ?

The company knew of this transaction as early as November, 1867. They had written to their agent, Simpson, saying that this premium was unreported, and the reply was, on November 14, 1867, that it "was paid by note." At this early date, at least two months before the note was due, they might have informed themselves of all the particulars of the transaction, and they could have known that their agent held a note for the premium due January 6-9, 1868, which note stipulated that its non-payment was to avoid the policy. It became them, therefore, thus early, to consider whether they should exercise their option of forfeiture. Had they instructed their agent, if the note was not paid on the 9th, that on the 10th he should declare to French that the forfeiture was insisted on, the policy was void, and its surrender demanded; this would have been prompt action. But nothing of the kind was done.

We have said that the company is chargeable with full knowledge of the transaction, because they might have known, and so were bound to know, just what their agent had done, and with this knowledge, and after the note was due, February 14, 1868, they ask for a report as to the renewal, among others, of this policy. Clearly they had not exercised their option of forfeiture then. Upon June 17, 1868, they write that a number of cases are still unsettled, of which this is one.

We have thus far said that they are fairly chargeable with knowledge of their agent's transaction, but it is not necessary to stand upon this alone. They had an agent at Cincinnati who was fully empowered to act in the matter. He was authorized on the part of the company to declare the policy void, upon non-payment of the note, if he saw fit to exercise that option.

This agent states that when the check was not paid he demanded back the renewal receipt; he also says that he informed French that, "as the matter stood, the policy was void." The statement, if true, does not seem to have been made for the purpose of declar-

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ing a forfeiture. No offer to surrender the note and check was made; a return of the policy was not demanded, and even afterward the agent seems to have sought payment of the check.

He states that he demanded payment of the check some twelve or twenty times, all of which demands were made within sixty days of July 25, 1867, the date of the check, after which he did nothing. That when he took the check and note to demand the return of the renewal receipt it was then that he informed Mr. French that the policy was void. This information, therefore, upon his own statement, must have been communicated prior to sixty days from the 25th of July, or prior to the 25th of September. Yet he writes to his company, November 14, 1867, nearly two months after, that this premium had been paid by note. It is very certain that informing Mr. French that his policy was void because the premium was not paid, and writing to the home office, at the very same time, that the premium was paid, is not such clear and definite exercise of the right to insist upon a forfeiture which the law demands.

Mr. Simpson seems to have labored under considerable apprehension as to being censured by his company, and whether this apprehension affected his testimony we cannot say. But, besides inconsistencies in his own letters and statements, he is contradicted by other circumstances.

Mr. Simpson endeavored to make his company believe, and would have it now believed, that he exercised this option by informing Mr. French that the policy was void in the summer of 1867. In his letter to the company, July 16, 1868, he informs them that Mr. French came in on the 7th of July to tender his premium, which was refused. "I then repeated the notification I had nearly a year before given him, that his policy had lapsed by non-payment of premium."

In June, 1868, when a new premium was about to become due, Mr. French sent his son with a note to Mr. Simpson, in reference to arranging for the premium. Simpson says he told the young man that as the premium of 1867 had not been paid the policy was void. The young man tells a different story. He says Simpson replied that he could not carry it again as he had done the year before. He then says that when his father received the answer he went and raised the money. This would not have been done if that answer had been that the policy was void. It was left to the

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jury to say who should be believed, Simpson or young French? It is very plain that if the young man is to be believed no foundation is left for Mr. Simpson's theory of forfeiture. If he had been carrying the policy the year before it was not void during that time. Again, the idea that Simpson, at any time prior to June, 1868, informed French that his policy was void, is inconsistent with other things.

It will be remembered that Simpson had been indulging Mr. French during the entire continuance of the policy; allowing him to pay half of the cash premium, giving a note for the rest. Mr. French was behind for the premium of 1867, and if he had understood that his policy was void for the non-payment of that premium he never would have written the following note:

"CINCINNATI SAVINGS BANK,
 "29 West Third Street," }
 "CINCINNATI, July 3d, 1868."

"DEAR SIR: I have been in daily expectation of money, but have not yet got it; and I propose to you the note of my son and daughter, with mortgage on real estate on Mt. Auburn, worth \$20,000, incumbered with mortgage for \$5,000 only, payable in April, 1869; the fee of the real estate is in them, and they are free from all debts. I want this indulgence for sixty days, to pay past dues and interest, and the cash payment for the next year on my life policy; condition, that if not paid at maturity the renewal receipt shall be void. Please answer.

M. FRENCH.

"ROB'T SIMPSON, Esq., Mutual Benefit Life Ins. Co."

If the insurance was void, as Simpson claims, there were no "past dues," for French owed nothing, and he would not be offering to raise money on mortgage to pay premiums on a policy which did not exist. Other than, than by asserting to Mr. French that his policy was void, Mr. Simpson seems to have done nothing to signify that he exercised his option of forfeiture. Whether or not he did make this assertion, as he claims, was a question of fact for the jury.

As far as we are able to discover, therefore, there was nothing done to inform Mr. French that his policy was void, up to the 6th of July, 1868, when he went to arrange for the premium of that year, unless we take into account the statements of Simpson, which were left to the jury. We then cannot consider that the company

exercised their option to forfeit, and their failure so to do was a waiver of such forfeiture. It is said that "slight evidence of waiver, as in other cases of forfeiture, will be sufficient." *Ripley v. Aetna Ins. Co.*, 29 Barb. 557.

As we have before said, the mere non-payment of the note is not alone sufficient to avoid the policy. Such payment was not a condition precedent to the attaching or continuing of the risk. It was rather a note with a condition of defeasance that might be made operative if desired.

The delivery of the renewal receipt shows, *prima facie*, that the risk had attached. And, again, the contract of life insurance is said to be "*sui generis*." The payment of any premium, after the first, is not a condition precedent to the vesting of all rights, though these rights are liable to forfeiture. The payment of the first premium and delivery of the policy covers the whole life-time, and makes a complete vested right to the sum insured, if there is death before another premium payable; if not, further premiums must be paid or forfeiture may ensue. But rights arise upon the payment of the first premium; they become vested then, and so remain until forfeiture. 37 N. J. 469.

We, therefore, cannot consider payment of this note as absolutely necessary before the renewal attached. It may not perhaps be necessary to hold, as did the court below, that demand of payment the day the note was due was necessary to work a forfeiture, but certainly something must be done between the date the note was due and the end of the year to establish and proclaim the forfeiture, or it must be held to be waived.

In cases of this kind, when so serious matters as forfeitures are contemplated, it becomes insurance companies and agents to act with fairness and candor, eschewing any thing like double dealing. *Helme v. Phil. Life Ins. Co.*, 61 Penn. St. 107.

It is urged by counsel that Mr. Simpson was figuring so as to ultimately secure payment of the check and note for his company, and still refuse to renew the policy in July, 1868. As that time approached, he knew that Mr. French was in failing health, and if he could hold on to these papers and escape the risk of another year by refusing the premium, it would be a desirable transaction in a pecuniary sense. We do not know that the jury were at all impressed with this view, but if they had been, we cannot say that it is absolutely unsustained by the testimony.

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It appears to us that the disposition to prevent and guard against forfeitures of this kind is plainly evinced by the authorities. *Sheldon v. Conn. Mut. Ins. Co.*, 25 Conn. 207.

In the *Georgia Mut. Life Ins. Co. v. Gibson*, 52 Ga. 640, the case was this: Gibson had his life insured, but upon his death the company contended that he had not paid up his dues, and so the insurance had been forfeited. He died in 1870, but in the spring of that year he had sent the company \$35.25 in payment of all his dues. The company retained the money till after his death without notifying him whether it was satisfactory or not. It was held that if the company received and retained the amount, this was a waiver of default. If the amount was not enough to pay past dues, it was the clear duty of the company to have promptly notified him. They should not have retained the money, and remained silent till after the death.

In case at bar, the company should not have retained the check and note, and remain silent, as they did. Yet it appears that on July 6, 1868, when Simpson refused the premium for that year, French offered to give up his policy if the company would return his check and note. This was refused.

A receipt of the premium after it was due is held to be a waiver of forfeiture. *Froelich v. Atlas Life Ins. Co.*, 47 Mo. 406; *Sims v. State Ins. Co.*, id. 54; *Hodsdon v. Guardian Life Ins. Co.*, 97 Mass. 144; *Thompson v. St. Louis Mutual Life Ins. Co.*, 52 Mo. 469.

In *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384, it is held that, upon a non-payment of premium at the proper time, the company have the right to declare a forfeiture; but if it failed to do so, it would be presumed that it chose to carry the risk, upon the responsibility of the party who had agreed to guarantee the payment. This case also holds, that when a company has acknowledged in the policy the receipt of premiums, it will not be allowed to dispute such acknowledgment.

The same is held in other Illinois cases. *Ill. Cen. Ins. Co. v. Wolf*, 37 Ill. 354; *Prov. Life Ins. Co. v. Fennell*, 49 id. 180.

In *Jolliffe v. Mad. Ins. Co.*, 39 Wis. 119; 20 Am. Rep. 35, which was a fire policy, it is said: "Forfeitures are not favored in the law, and will not be sustained upon mere inferences. Where, upon breach by one party of a condition or stipulation in a contract, the other party thereto has the option to declare the contract forfeited, and thus relieve himself from liability upon it, and seeks to exer-

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cise such option, he must do so unconditionally, and in plain, positive and unmistakable terms."

Nor do these views conflict with *Robert v. Ins. Co.*, 1 Dis. 355, a case which counsel seem to think decisive of this. In that case the court admit that subsequent acts may prevent the avoidance of a policy, quoting some of the authorities already cited (p. 365).

As the case stands upon the evidence, it was possible for the jury to find that in prior years Mr. Simpson, who was fully authorized to act in the premises, had varied from the strict rules of the company, and allowed Mr. French to pay half the premium in cash, giving a short note for the balance. In 1867, the check is given payable ahead, and a six months' note, containing, for the first time, this clause of forfeiture. Simpson endeavors to collect the check, but takes no steps to avoid the policy, allowing Mr. French to believe that its validity was not impaired. At the end of the year, when the failing health of the assured impresses upon the agent the belief that further risk would entail the loss, he, for the first time, declares the policy already forfeited as a past event.

These facts, and the questions of forfeiture and waiver, were fairly submitted to the jury, and we cannot say that they have so clearly erred as to justify us in setting aside the verdict.

They appeared to have found either that, if there was a forfeiture, it had been waived, and, consequently, that the premium of 1867 had been paid. This being true, French was entitled to a renewal for the year 1868, upon tendering the amount of premium due, July 6, 1868. That amount was \$725, one-half of which was \$362.50, the proper sum to be tendered. Simpson makes it more by adding in interest on the premium order. But we agree with counsel, that a tender of this interest was not necessary, as there is nothing in the policy to forfeit it on account of non-payment of interest.

But Simpson swears that there was not \$362.50 tendered. In this he is again contradicted by testimony tending to show the contrary. This was fairly submitted to the jury, and we cannot say that their verdict was clearly wrong.

We have not elaborated all the points raised by counsel, but upon the views stated, the judgment must be affirmed.

Judgment affirmed.

SCOTT, J., dissented.

WILKINS V. TOBACCO INS. CO.

(30 Ohio St. 317.)

Insurance — deviation — warranty.

Where the contract of insurance on a steamboat stipulates for its continuance for one year, "unless it is terminated or made void by conditions therein-after expressed," and contains a "permission to navigate the Ohio and Mississippi rivers below Cairo," but contains no condition expressly avoiding the policy for navigating the boat outside of the permitted waters, and the boat made a trip outside of these permitted waters and returned in safety where she was afterward destroyed by fire, in no way caused or contributed to by such departure, *held*, that the only effect of such deviation was to relieve the insurer from any loss happening outside of the permitted waters, and that said policy was not avoided thereby, and that after a temporary departure and return in safety to the permitted waters, the insurers are liable for a subsequent loss covered by the policy, not caused or contributed to by such deviation.

ACTION on a policy of insurance on a steamboat. The policy contained a "permission to navigate the Ohio and Mississippi river below Cairo." During the term the boat made a trip up White river, without consent of the insurers, but received no injury on that trip. Subsequently a loss by fire occurred.

Lincoln, Smith & Stephens, for plaintiff in error.

Hoadly, Johnson & Colston, for defendant in error, claimed that the language used in the policy amounts, in law, to a warranty upon the part of the assured, that the St. Patrick should navigate none other than the permitted waters. *Hop. Man. Mar. Ins.* 181, 182; *Odiorno v. Ins. Co.*, 101 Mass. 551; *Colledge v. Hartley*, 6 Exch. 205; *Sawyer v. Ins. Co.*, 6 Gray, 221; *Palmer v. Ins. Co.*, 1 Story, 360; *Arnold on Ins.*, §§ 213, 215; *Fernandez v. Ins. Co.*, 48 N. Y. 571; *Coffin v. Ins. Co.*, 9 Mass. 436; 1 *Arnold on Ins.* 342; *Hartly v. Buggin*, 3 Doug. 39; *Ins. Co. v. Abbott*, 12 Md. 348; *Park on Ins.* 294; 1 *Phillips on Ins.* 987.

JOHNSON, J. [Omitting a preliminary question.] 2. Was the trip up the White river such a *deviation* or *breach of warranty* as rendered the policy void, so that no recovery can be had for a sub-

sequent loss within the life of the policy, when such loss was not caused or contributed to by such trip?

The insurers claim that it was. They point to the words found among the stipulations of the underwriter, "with permission to navigate the Ohio and Mississippi rivers below Cairo," and to those found under the head of "Warranted by the assured," "that the said vessel shall be run and navigated on the aforesaid privileged waters, as is usual for boats of her class," and claim that these provisions amount to a *warranty* by the insured, that he will not take the boat out of the permitted waters, the legal effect of which is to avoid the policy in case of a deviation.

On the other hand it is claimed that no such warranty exists. It is admitted that if the loss had occurred while the boat was navigating other than the permitted rivers, no recovery could be had, but that on her return in safety to those rivers the boat was covered by the insurance, and that for any subsequent loss by fire the plaintiff may recover.

To determine this issue of law we must examine this contract by the light of those principles of construction that govern in such cases.

Among these are the following well-settled rules: "As a contract of indemnity to the assured, the policy is to be liberally construed in his favor, not only because this mode of construction is most conducive to the interests of commerce, but because, for the reasons that have been stated, it is probably most consonant to the intentions of the parties. It is certain that the assured desires as ample an indemnity as he can obtain, and it is probable that the insurer means that he shall understand the indemnity given to be as extensive as its terms, upon any fair interpretation, import." 1 Duer on Ins., § 5, p. 161.

"When statements and engagements on the part of the insured are inserted or referred to in the policy itself it often becomes difficult to determine to which class they belong. If they appear in the face of the policy they do not necessarily become warranties. Their character will depend upon *the form of expression used, the apparent purpose of the intention, and sometimes upon the connection or relation to other parts of the instrument.*" *Campbell v. The Eng. Mutual Life Ins. Co.*, 98 Mass. 391.

In the same case it is said: "In considering the question whether a statement forming a part of the contract is a warranty, it must

Wilkins v. Tobacco Ins. Co.

be borne in mind, as an established maxim, *that warranties are not to be created nor extended by construction*; they must arise, if at all, from the *fair interpretation and clear intendment* of the words used by the parties." 98 Mass. 391.

"A warranty cannot be extended by inference beyond the strict meaning of the words in which it is expressed. As was said by Chief Justice SHAW, in *Forbush v. Western Massachusetts Ins. Co.*, 4 Gray, 337, 341, 'nothing is to be added by way of intendment or construction, when the words are clear and intelligible, although it may reasonably be inferred that some object was intended to be accomplished by the warranty, which a mere literal compliance would not fully reach.' The chief justice there cited with approval a case in the Queen's Bench, in the time of Lord MANSFIELD, of a ship warranted to have twenty guns, and proved to have had twenty guns but only twenty-five men, when it required sixty men to man twenty guns; and in which the underwriters contended that the warranty implied that there should be a proportionable number of men, but the court held otherwise." *Thwing v. Great West. Ins. Co.*, 130 Mass. 401; 4 Am. Rep. 567.

"Courts are not disposed to favor warranties *by construction*, and if the terms used are fully satisfied as a description, they will not be extended to include a warranty, unless it is clearly expressed that such was the design and meaning of the parties. These views are sustained by authorities entitled to great consideration." *United States F. & M. Ins. Co. of B. v. Kimberly*, 34 Md. 231, 232; 6 Am. Rep. 325.

In *Yeadon v. Fry*, Chief Justice MARSHALL says: "The counsel has considered the *exception* as a warranty; but the court cannot so consider it. The words are the words of the insurer, not of the insured, and they take a particular risk out of the policy, which, but for the exception, would be comprehended in the contract.

. . . Policies of insurance are generally the most informal instruments which are brought into courts of justice, and there are no instruments that are more liberally construed in order to effect the real intention of the parties if that intention can be clearly ascertained."

"All the conditions and terms of the policy, both written and printed, should be construed liberally for his benefit" (the assured's), "and so as to effectuate, as far as may reasonably be

done, the indemnity which he justly expected." *Etna Ins. Co. v. Jackson*, 16 B. Monr. 258, 259.

"Conditions subsequent are not favored in law, are not to be raised readily by inference or argument, and only when apt and sufficient words are used for that purpose." *Laberee v. Carleton*, 53 Me. 212, 213.

"Such a condition, when relied on to work a forfeiture, is to be construed with great strictness; the demandant shall have his exact legal right, but no more." *Merrifield v. Cobleigh*, 4 Cush. 184.

"The same rules of construction which apply to all other instruments apply equally to policies of insurance—namely, that they are to be construed according to their sense and meaning as collected from the terms used, which terms are to be understood in their ordinary and popular sense, unless they have generally, in respect to the subject-matter, as by the known usages of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to the contract, be understood in some special and peculiar sense." *Robertson v. French*, 4 East, 130; *Hone v. Mut. Safety Ins. Co.*, 1 Sandf. 151; *Palmer v. Warren Ins. Co.*, 1 Story, 365; 1 Parsons on Marine Ins., ch. 4, § 9.

The policy commences with this stipulation:

"This policy of insurance witnesseth, that the Tobacco Fire and Marine Insurance Company of Cincinnati, by these presents, do cause M. Pyne to be insured in the sum of not exceeding three thousand dollars, lost or not lost, upon the steamer St. Patrick, wherever she is in safety at noon of the 3d day of July, 1867, and from thence to noon on the 3d day of July, 1868, when this policy shall expire, *unless sooner terminated or made void by conditions hereinafter expressed.*"

"With permission to navigate the Ohio and Mississippi river below Cairo, Ill. Coal oil clause waived."

It is to continue until July 3, 1868, unless sooner terminated or made void, *by conditions hereinafter expressed.*" By its terms it is to remain in force for one year, unless avoided by subsequent *expressed condition*. The words, "with permission to navigate the Ohio and Mississippi river below Cairo," are written in the printed policy immediately after the clause providing for its termination,

but their natural position in the contract is immediately preceding that clause.

We will look in vain through the contract, filled with stipulations, conditions, and warranties, for any provision which *expressly* avoids it in a case of this kind. While there are numerous conditions and stipulations in which it is expressly avoided if they are not complied with, there is none avoiding it for a temporary deviation.

Thus, under the head of "obligations of the assured," it is to be void if the insurance exceeds \$22,500, or upon assignment of the policy or charter of the vessel without the approval of the company indorsed thereon, or during the time hemp shall be carried on deck uncovered, or lime in the hold, or cotton on the hurricane deck; also, if the premium notes are not paid in fifteen days after maturity, and remain void until paid.

It is also provided it shall cease while the vessel is in the custody under proceedings in law or in equity, except during five days after seizure; and that a violation or non-compliance with any such conditions vitiates the policy.

Under the same head, in what is called the "warranty clause," there are many warranties, stipulations and conditions, in some of which the penalty expressly named for their violation avoids, or rather suspends the policy. In that clause relating to unseaworthiness, it is provided that the policy shall be void while the vessel is unseaworthy, except while going to a port for repairs, or while they are being made.

As there is no *express* condition avoiding this policy for the cause in question, we may well apply the maxim, "*expressio unius exclusio alterius.*"

As there is no express condition, let us further inquire if there is any *implied* from the express terms of the policy. The contract of the insurer is for one year, "*unless sooner terminated or made void by conditions hereinafter expressed.*" From this it is clear it cannot be avoided by any *implied* conditions.

We are thus left to inquire as to the legal effect of the "conditions *expressed.*"

It is said the permission to navigate certain waters is equivalent to prohibiting the navigation of all others. We agree with MARSHALL, C. J., in *Yeadon v. Fry, supra.* These "are the words of the insurer, not of the insured, and they take a *particular*

risk out of the policy, which, but for the exception, would be comprehended in the contract." They do not amount to a warranty.

The stipulation in the warranty clause, "the said vessel shall be run and navigated upon the privileged waters *as is usual for vessels of her class in the usual prosecution of business*," has no provision avoiding the policy if violated, though a failure to run and navigate the vessel as usual would, if loss ensue from such neglect of duty, avoid it. If no loss ensued from such failure, and a loss does happen from a subsequent cause insured against, no one would claim that the policy was void. Clearly this clause relates to the *mode and manner* of navigating the vessel within the permitted waters. It is not a *warranty* by the assured that he will navigate no other waters, but only that he will navigate the permitted waters in a proper and skillful manner, as is usual with boats of her class. This clause cannot have two distinct and incongruous meanings, one to provide against unskillful use of the boat within the permitted waters, the penalty of which is to defeat the policy when it is the cause of a loss, and the other to avoid the policy, however skillfully it is done, if there is a deviation from these waters.

Again, we must keep in mind the difference between a *voyage* and a *time* policy.

The voyage policy insures a *voyage* from a *terminus a quo* to the *terminus ad quem*, in a prescribed course, which, though seldom set out in the policy, forms part of it, and is as binding on the insured as though mutually detailed. The voyage being in the course of navigation on and in which the ship actually sails. If there is a voluntary variation from this course, it is a *deviation*, because it is an abandonment of the *voyage* which was insured, and for any subsequent loss from any cause whatever the boat is uninsured.

The voyage actually made is not the voyage insured, therefore no recovery can be had.

A policy on time insures no specific voyage, but covers any voyage within the prescribed time, and the loss and damage the ship may sustain by the perils insured against within the limited period. 1 Arnold on Ins. 333 and 409.

Strictly speaking, there can be no deviation in a purely time policy, if the vessel sails upon any voyage for which she is seaworthy. "Like the former silent warranty, it is presumed that

this does not operate when a ship is insured on time." Hopkins' Man. of Ins. 184.

The other silent warranty here spoken of is seaworthiness: "But policies on time have recently come into use, partly, no doubt, to obviate the danger arising from the doctrine of deviation, which, though often slight, and quite immaterial to the actual risk, has often defeated contracts of insurance, where there has been no increased risks, and thereby done much to prevent the benefits afforded to commerce by honest insurance." *Capeu v. Wash. Ins. Co.*, 12 Cush. 537.

There is still another class of policies, which partake of the nature of both, which may be called mixed policies: As "at and from A to B for six months;" or, "at and from Liverpool to New York from January 1, 1847, to January 1, 1848."

In speaking of these mixed policies, Arnold says (vol. 1, p. 412): "They agree with time policies in this, that the underwriter cannot be liable for any loss incurred by the subject of the insurance unless it occurred within the limits of the time specified in the policy; and, on the other hand, they are so far similar to voyage policies *that the ship must have originally sailed on the voyage prescribed in the policy, and the underwriter will not be liable for any loss, though incurred within the limits of the time, unless the ship at the time of the occurrence be sailing on the prescribed course between the termini of the voyage.*"

"Strictly speaking, a 'deviation' originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from or change in the risk insured against, without just cause." 2 Pars. on Mar. Ins. 1.

On page 5 the same author says: "Nor are they discharged if the change of risk is *merely temporary*, and, when it ceases, all subsequent risks are precisely and certainly the same as they would have been had no deviation taken place. In this case the effect of the deviation is only to *suspend* the responsibility of the insurers, and discharge them from any liability for a loss which occurs during the existence of the deviation. But it is obvious that there are very few changes of risks that can be said to leave all the subsequent perils in precisely the same condition as if there had been no change; and this exception, therefore, is seldom applicable."

And in note 2, to the above, he says: "Mr. Justice SEDGEWICK, in delivering the opinion of the court, in *Coffin v. Newburyport*

Mar. Ins. Co., 9 Mass. 436, 449, said: 'It is undoubtedly true that the shortness of the time, or the distance of a deviation, makes no difference as to its effect on the contract. Whether for one hour or one month, or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity it puts an end to the contract.' *It would seem, however, that there may be a temporary deviation, which would exonerate the underwriters for loss during such deviation, but not for a subsequent loss.* Thus, if a steamboat which makes regular trips between two ports is insured for one year, and if, after the trip for the day is ended, she should tow a vessel or do any other similar act, the underwriters might be liable if she were subsequently lost on a regular trip or while lying in port, although not if she were lost while engaged in towing."

In a voyage policy the time of starting and the course of the voyage, with its *termini*, are important with reference to winds, storms, etc.

In a *time* policy, as there is no voyage named and no time specified, these considerations are of little importance.

The case of *Greenleaf v. St. Louis Ins. Co.*, 37 Mo. 30, presents the whole question upon the right ground. In the policy sued upon in that case, insuring the steamer, after the language found in this policy, was the following: "The Missouri, Arkansas, White Red and Yazoo rivers excepted."

The court say: "The language here does not amount to a prohibition or a condition, or a warranty. The words without the exception would embrace all the tributaries of the above-mentioned rivers. The exception has the effect of restraining or suspending the liability of the underwriters in a certain event. If the intention had been that the policy should be defeated by making voyages on any of the excepted rivers, that intention would have been expressed. But if there is any doubt of it, that exception being made by the parties for their own benefit to relieve themselves from a risk which they otherwise would have incurred, the doubt is to be resolved against them. The policy did not amount to a prohibition or warranty against navigating the excepted rivers, on the part of the assured, but to a suspension of the risk during the period the boat was so employed."

This is not like the case of *Con. Mut. Ins. Co. v. Stevens*, which contained a *warranty* that the vessel *should not* use certain ports, and these were a breach. 2 Pars., note 3, p. 5.

In *Palmer v. The Warren Ins. Co.*, 1 Story, 364, Judge STORY says: "Exceptions, therefore, in a policy, if they admit of any other reasonable interpretation, ought not to be construed as cutting down the policy to a particular voyage, excluding all others, but to be deemed exceptions of time and risks in particular ports or parts of voyages."

"If a policy of insurance were underwritten for a year on a ship, *excluding* the month of October, we should say that it was but an exception of that month. If a policy was on all the cargo on board a ship, excluding the fruit on board, we should deem it a mere exception of the fruit. On the other hand, if the words were, *excepting* the fruit on board, we should as readily say that the fruit was excluded from the risks stated by the policy. But in neither case should we say that fruit was prohibited from being taken on board in the voyage. It does not appear to me, therefore, that any difficulty in the interpretation of the clause arises from any grammatical inaccuracy in the use of language. It will make no difference in my judgment, in the present case, whether the word '*excluding*,' in this policy, is interpreted in its more common sense of shutting out, or in the sense of '*excepting*,' although I have no doubt that the latter is the true and appropriate sense in the clause of the policy under consideration."

In determining the character of the words "with permission," etc., the *form* of the expression, and the *connection* in which it is found in relation to other parts of the instrument (98 Mass. 391) are suggestive on the question of intention.

They are the words of the insurer, in form permissive, and not prohibitory, and in connection with the stipulations which define the obligations of the underwriter.

They do not purport to be the covenants of the assured, and are not in that part of the policy containing his obligations.

When, as in this case, it is evident the underwriters have taken much pains to insert so many stipulations in the form of covenants, or obligations by the assured, and provide that the policy shall be avoided for a non-performance of some of them, the presumption arises, especially when taken in connection with the general provision in the beginning of the policy, that it is to continue one year, "unless sooner terminated or made void by conditions *hereinafter* expressed;" that if it had been the intention of the parties to avoid the policy for such a temporary departure, that intention

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would have been expressed. We do not feel authorized by the current of modern authority to create by an enlarged construction implied warranties in policies of this nature, calculated to defeat the terms of the instrument, but rather incline, in cases of doubt, to that construction which is most conducive to the interests of commerce and the intention of the parties as disclosed by a fair interpretation of the contract.

SCOTT, J., dissented.

Judgment reversed and cause remanded.

RAWSON V. TAYLOR.

(30 Ohio St. 389.)

Partnership — rights of creditors as to partner assuming partnership liabilities.

A retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become parties thereto.

R. held the promissory note of the firm of T. G. & Co. After it was given, some members of the firm retired, leaving assets sufficient to pay all debts, and taking the obligation of the succeeding new firm, to pay all debts and save the retiring partners harmless. *Held*, that unless R. by some valid contract, express or implied, had made himself a party to this new arrangement, or had so acted as to be estopped, his rights on the note against all the members of the old firm remained unchanged; that while, as between the partners themselves, the relation of principal and surety existed, yet, as to the payee of the note, all were principals and joint debtors, although notice of such obligation was brought home to him.

Where the payee of such note has received from the new firm a chattel mortgage of the partnership property sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had notice of the subsequent contract between the partners.

ACTION on a note. The opinion states the facts.

J. P. Bishop, for plaintiff in error.

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McKinney & Caskey and *R. P. Ramey*, for defendants in error. One of several makers of a joint note who, for a valuable consideration, assumes and agrees to pay the note, becomes principal, and the other makers are simply his sureties. *Craft v. Motts*, 4 Comst. (N. Y.) 604. And this rule is recognized as applying to partners, in *Butler v. Birkey*, 13 Ohio St. 523. *Wilson v. Lloyd*, 6 Eng. Rep. 642, *Moak's Notes*; *Waddington v. Vredenburg*, 2 Johns. Cas. 227.

The relation of principal and surety, by reason of the relation of the debtors to each other, or by contract, binds the creditor whenever the existence of that relation is brought home to his knowledge. Story on Part., § 158; Pars. on Notes and Bills, vol. 1, pp. 234, 235, notes; vol. 3 Lead. Cas. in Eq., 573, 675. This doctrine is recognized in *Elwood v. Deifendorf*, 5 Barb. 398; *Oriental Fire Corp. v. Overend*, 1 Eng. Rep., *Moak's Notes*, 478.

This relation existing, and being brought home to the knowledge of the creditor, the releasing of securities or retracting steps taken for security of debt, or doing any thing to the injury of surety, releases him. 2 Am. Lead. Cas 343-5, 355 and 424; vol. 3 Lead. Cas. in Eq. 552, 556; 1 Story's Eq. Jur., § 325; *Baker v. Briggs*, 8 Pick. 122; *Law v. East India Co.*, 4 Ves. Jr. 829; *Ido v. Churchill*, 14 Ohio St. 386; *Oakley v. Pasheller*, 4 Cl. & F. 207; *Wilson v. Lloyd*, 6 Eng. Rep., *Moak's Notes*, 642.

JOHNSON, J. The note sued on was the joint liability of all the partners in the firm of Taylor, Griswold & Co. Taylor and Finger as well as Griswold were principal debtors. When the note was executed and delivered to Mrs. Rawson, for a valuable consideration, the liability thereon of each partner became fixed. Their relations to that contract, and their liabilities thereon, could by no act between themselves be changed. After this note was given, two of the partners, Taylor and Finger, retired from the firm, and a new one was formed including Griswold, their former partner, which obligated itself to the retiring partners to pay all debts and save them harmless. Of this arrangement, it is claimed that Mrs. Rawson had notice. The evidence tends to show *constructive* notice to her of the formation of the new partnership to succeed Taylor, Griswold & Co., and subsequent dealings by her with the new firm. Whether she ever in fact knew of this arrangement, by which the new firm was to pay the debts of the old, does not appear, but, conceding that she did, the question presented by the charge of the court is, as to the effect of such knowledge on her rights on the note.

The charge was: "If she did have notice, then she was, after that knowledge, bound to treat them as sureties, and they were entitled to all the protection that sureties would be entitled to, *as if the names of Taylor and Finger had been attached as sureties when the note was executed.*"

It is not claimed that Mrs. Rawson *assented* to this new arrangement, or by any valid contract, express or implied, agreed to modify or change the relations of these joint obligors to her upon the note but simply as between themselves, by the new arrangement, Taylor and Finger became sureties of their copartner Griswold, of which fact Mrs. Rawson had notice. It is admitted that so long as she was not informed of this arrangement her rights and duties remained as fixed when the note was given, but it is claimed that when such notice was given, then Taylor and Finger were entitled to the same rights and protection as if they had been original sureties.

In substance, the charge of the court lays down the law to be that the liability of principals on an obligation may be converted into a liability of suretyship by the acts of the obligors without the assent of the obligee, by giving notice of such new arrangement.

In *Thurston & Hays v. Ludwig*, 6 Ohio St. 1, it was held that in order to change or vary the terms of a written contract, there must be a new contract to that effect between the parties, based on some new consideration, or such new contract must have been so far executed or acted upon that a refusal to carry it out would operate as a fraud.

Such is the general rule governing all contracts. In its application to cases like the one at bar, Story says: "It frequently happens that upon the retirement of one partner, the remaining partners undertake to pay the debts and to secure the credits of the firm. This is a mere matter of private arrangement and agreement between the partners, and can in no respect be admitted to vary the rights of existing creditors of the firm." Story on Partnership, § 154.

If the creditor assents to such arrangement after it becomes known to him, "and by his subsequent act or conduct, or binding contract, he agrees to consider the remaining partners as his exclusive debtors, he may lose all right and claim against the retiring partner."

The precise question at bar was considered at great length in *Maingay v. Lewis*, Irish R. Com. Law, 495 (1869).

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To an action on money counts, the defendant pleaded that the cause of action accrued against him and one W. and one S. as partners; that afterward the firm was dissolved by a memorandum, of which plaintiff had due notice, by which W. agreed to pay all debts of the firm and indemnify his copartners from all claims, by which he became a surety only, of which plaintiff had notice, and after such notice took a bill of exchange at three months from W. alone for the amount, and thereby gave time to W., whereby defendant was discharged from liability. It was held that this plea was bad, and did not constitute a defense either at law or in equity, *WHITESIDE*, C. J., saying: "It is clear that no arrangement among joint debtors could prejudice the rights of their creditors." Again: "Another averment is that the plaintiffs 'had notice of this arrangement.' Well, I do not see how the men giving notice to the plaintiff of an arrangement by which they cannot be affected is to prejudice their rights."

In that opinion the distinction is clearly drawn between a case where the relation of principal and surety existed *inter se* at the time the obligation was entered into, of which the creditor had knowledge, and a case of joint principals *inter se* at the date of the obligation, and a subsequent agreement between the joint debtors, by which, as between themselves, one becomes a surety of the other, of which subsequent arrangement the creditor had knowledge.

It is of the first importance to keep in mind the distinction, as it furnishes the key to harmonize many apparently conflicting decisions. In the former class of cases, the relation of suretyship exists at the very inception of the contract. The obligee having knowledge of that relation before he accepts the contract, takes it subject to all the rights and equities of such sureties *inter se* not inconsistent with the terms of the contract.

On the other hand, where the obligors are in fact joint debtors, he accepts them as such, and no subsequent arrangement between the joint debtors alone can change that relation. *Bedford v. Deakin*, 2 B. & Ald. 210; *Evans v. Drummond*, 4 Esp. 89; *Pooley v. Harradine*, 7 E. & B. 431; *Butler et al. v. Birkey*, 13 Ohio St. 523; Pars. on Part. 421-425, ch. 13; *Manley v. Boycot*, 2 El. & B. 46; 75 E. C. L. 45.

We may concede that such an agreement between remaining and retiring partners, with notice to a partnership creditor, would impose upon him the duty of acting in good faith and with reasona-

ble diligence in the management of securities placed in his hands for the payment of his claim, in the preservation of liens, and in the application of payments made.

A failure by the creditor, after such notice, to perform these duties, resulting in damages to the retiring partner, might well be regarded in a court of equity as cause to release him.

In such case the terms of the contract have not been changed, but the fact that new relations had arisen between the partners, by which one assumes, as between them, the burdens of all, might well call upon the creditor to act in such way as not to injure the retiring partners. *Rees v. Berrington*, Eq. Lead. Cases, pt. II, p. 1902.

In such cases it has been held that if the creditor should give up securities in his hands, and take those of the new firm, or give long credit for additional interest or new security, or release a levy made, without the consent of the retiring partner, then in all such cases the retiring partner will be discharged. Story on Part., § 158 *et seq.*; Pars. on Part. 421 *et seq.*; Collyer on Part. 554-570; *Harris v. Lindsay*, 4 Wash. C. C. 271; *Bedford v. Deakin*, 2 Barn. & Ald. 210.

An examination of the cases in support of the doctrine of the text-books fails to support the charge of the court below. Upon both reason and authority, therefore, we conclude that as Mrs. Rawson was not a party to this new contract between the partners, by which the new firm assumed the debts of the old, and had never assented thereto, or agreed to be bound thereby, her rights on the promissory note, to regard all as principals, have not been altered or impaired.

These principles are aptly illustrated by the case before us.

By the several mortgages the claim of Mrs. Rawson was amply provided for. Dudley, as the agent of the mortgagees, had sold sufficient property to pay them in full, and held the money, the proceeds of such property, applicable to such payment. So much of this money as equalled the claim of Mrs. Rawson belonged to her. Had she, without the consent of these retiring partners, and with full knowledge of her rights, surrendered it back to E. R. G. & Co., after notice that they were the principal debtors, and thus have thrown the burden on these defendants, equity might well treat them as discharged.

In this case, it is not clear that Mrs. Rawson had full knowledge of all the facts, and it is clear that Taylor and Finger consented

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to the surrender of the money then in Dudley's hands. Had it been distributed, the debt would have been satisfied. The reason why it was not so applied by Dudley is disclosed in the bill of exceptions.

E. R. Griswold & Co. had succeeded in compromising with their general creditors, and had obtained their consent to a return to the firm of the unsold goods then in the hands of Wyman, the assignee.

They also desire to get possession of the money in the hands of Dudley. To do this, they must have the assent of all the mortgagees who were entitled to receive their proportions of that fund. Taylor and Finger were among the mortgagees whose assent was necessary.

To secure such assent, a paper was drawn up and signed by all the parties interested in the funds. Taylor and Finger assented. They are first to sign this paper, thereby recommending the others to do the same. Mrs. Rawson, seeing their names to it, was influenced to sign among the last. Taylor and Finger took good care, however, to insist on a private arrangement, in fraud of the rights of the other creditors, by which they received their share of these moneys, unknown to Mrs. Rawson.

We think the court erred in saying that their signatures to this paper operated only as to their individual interest in the fund.

The avowed object of this paper was "to promote a settlement of the affairs and business of the firm of E. R. Griswold & Co."

All had to sign to make the scheme operative. The object was to re-instate the embarrassed firm in business. It may be that if part only had signed, the trustee might have paid the others their share, and returned back to E. R. G. & Co. the shares of the assenting parties, yet it is quite evident that the paper, which all in fact signed, was an express assent of each; that Dudley was authorized to return to the firm, not only his own share of the money, but also the shares of the other mortgagees. In short, Taylor and Finger assented to this arrangement as an entirety. They consented that Dudley should, instead of paying the debt to Mrs. Rawson, return the money to E. R. Griswold & Co., to enable them to resume business.

Taylor and Finger, by signing this paper, consented, not only that their share of the money should be returned to E. R. G. & Co., but also consented that Mrs. Rawson should do the same. They

said to her: We are willing, in order to promote a settlement by our principals, and enable them to start again in business, that you shall hold our note unpaid, and return to them the money in Dudley's hands applicable to its payment. In *Woodcock v. Oxford and Worcester Railway Co.*, 1 Drew. 521, D. and S. were sureties of A., B. and C. A. and B. retired, and F. was substituted. Subsequently disputes arose between the new firm of C. & F. and the company with which the old firm had contracted, on which contract D. & S. were the sureties.

The sureties were not parties to the transactions growing out of these disputes, but acted as the solicitors of the new firm, and prepared many of the documents by which the original contract was varied. It was held that the sureties were not discharged by reason of these changes, because, with full knowledge of the facts, they assisted as solicitors in carrying into effect the arrangements of which they complain. These defendants having signed this paper, thereby consented and recommended that all the other mortgagees do the same. This consent bars their present defense.

III. It is also claimed by the defendant that the receipt of interest on the 15th of November, 1867, to the 17th of the same month was such a giving of time as discharged the defendants.

The authorities cited and the conclusions reached on the first point disposes of this.

As these defendants were still jointly liable on the note as partners, the mere payment of the interest by one jointly liable with them, for a time in advance, would not discharge them, even if we concede that such payment, by operation of law, extended the time on the note.

Judgment of Common Pleas reversed and cause remanded.

COZZENS V. FARNAN.

(30 Ohio St. 491.)

Statute of limitations — disability — coverture succeeding infancy.

A statute provided that if any person entitled to maintain ejectment be at the time his title accrued within the age of twenty-one years or *feme covert*, he or she may bring the action within ten years after such disability is removed. *Held*, to extend only to disabilities existing at the time when the right or cause of action first accrues.

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Therefore, where a plaintiff is under the disability of infancy only, when her right of action first accrues, and afterward marries before she becomes of full age, her coverture is not available as a disability within the statute. Her action can be commenced only within ten years after she becomes of full age.*

EJECTMENT. The opinion states the facts.

R. P. Spalding and A. M. Jackson, for plaintiff in error, cited Co. Lit., of Descents, L. 3, c. 6, § 403; Sheph. Touch. 31; Godbolt, 365; *Hearle v. Greenbank*, 1 Ves. Cas. 305; *Strithorst v. Graeme*, C. B., 3 Wils. 145; *Dillon v. Leman*, 2 H. Black. 584; *Rhodes v. Smethurst*, 4 Mees. & W 42; *Murray v. The East India Company*, 5 Barn. & Ald. 204; *Chandler v. Vilett*, 2 Saund. 120; *Hobart v. Conn. Turnpike Co.*, 15 Conn. 145; *Gallup, Adm'r, v. Gallup*, 11 Metc. 445; *Wood v. Lessee of Ferguson et al.*, 7 Ohio St. 288; *Clark v. Vaughn*, 3 Conn. 191, 193; *Cotterell v. Dutton*, 4 Taunt. 826; 2 Preston's Abs. Tit., § 339; Blanchard on Stat. Lim. 18, 19; *Burrows v. Ellison*, 6 L. R. 1870-1; *Wilson v. Kilcannon*, 2 Hayw. 182; *Davis v. Cook*, 3 Hawkes, 608; *Hanger v. Abbott*, 6 Wall. 532; *Ford v. Langel*, 4 Ohio St. 464.

S. Burke, for defendant in error.

SCOTT, J. To the action of the plaintiff in the Court of Common Pleas, the defendant below, who is also defendant in error, answered setting up, among other things, the statute of limitations as a bar to the action. In regard to the limitation of twenty-one years, pleaded by defendant, the act governing the case was that of February 18, 1831. Chase's Stat. 1768.

It provides, in section 1, among other things, that "the action of ejectment, or any other action for the recovery of the title or possession of the lands, tenements or hereditaments, shall be commenced within twenty-one years after the cause of action shall have accrued, and not after." Provided (in section 2), "That if any person entitled to have or maintain any action of ejectment for the recovery of the title or possession of any lands, tenements or hereditaments, be at the time his right or title first descended or accrued, within the age of twenty-one years, *feme covert*, insane or imprisoned, every such person may (after the expiration of twenty-

* See *Keal v. Healey* (84 Ill. 104), 25 Am. Rep. 434, 435.

one years from the time his right or title first descended or accrued) bring such action within ten years *after such disability was removed*, and at no time thereafter."

This does not differ, in substance, from the law as it now stands under the Code.

From the pleadings in the case, and the findings of the Court of Common Pleas, it appears that the plaintiff's cause of action accrued in 1838, or, at farthest, in 1842. She was then a minor, and continued to be such until 1848. In 1847, being only seventeen years old, she was married, and has ever since been, and still is, under coverture. Her action was brought in August, 1865, when the twenty-one years, to which her right of action was limited by the first section of the act, had fully expired. If the ten years given by the second section of the act to persons under disability, began to run when she became of full age, in 1848, then the bar of the statute was complete before suit brought. But if the disability of coverture, occurring after the cause of action accrued, and before the disability of infancy had been removed, continued to her the protection of the second section, so that the ten years given by it do not begin to run during her coverture, then she might well bring her action, for she is still under coverture.

The question thus presented depends on the construction to be given to the second section of the act, and if determined adversely to the claim of the plaintiff, must, of course, end her case. We propose, therefore, first, to consider this question.

And, first, how stand the authorities upon this question? The precise question here made has not been passed upon by the Supreme Court of the State, in any reported case, so far as we are aware. But it has frequently arisen in this country, in other States, under statutes substantially similar to our own. In the case of *Edgar and Wife v. Commonwealth*, 4 Mass. 182, this very question arose. The plaintiffs there, as in this case, contended that as the wife was an infant when her right accrued, and as the disability of coverture occurred before the termination of her infancy, she was protected by the proviso (which corresponded with the second section of our statute of 1831); because there had been no moment of time, since her right accrued, in which she had not been under disability. But the court (PARSONS, C. J., delivered the opinion) unanimously held, that "the disability, to be sufficient to bring the plaintiff within the proviso, must be one existing at the

time the right first accrued." The court said: "We have no power, by an equitable construction, to defeat the operation of the enacting clause. * * * If we were once to admit a disability not existing when the right accrued, as within the proviso, it would be difficult to decide how far we must go." And it was held that the court must adhere to the express words, and natural and clear import of the proviso, in favor of persons under disability.

In *Eaton v. Sanford*, 2 Day's Cases, 523, a contrary construction was given to a similar proviso, by the Supreme Court of Connecticut; but the soundness of this ruling was strongly questioned in the subsequent case of *Bush v. Bradley*, 4 Day, 298. In this case, however, the court did not find it necessary to pass upon the question; but in *Bunce v. Wolcott*, 2 Conn. 27, the same court expressly overruled the doctrine of *Sanford v. Eaton*, and it was held by SWIFT, C. J., and all the judges who sat in the case, that the saving clause of the statute applied only to a disability existing when the cause of action accrued and not to any supervenient disability.

The question there was, as here, whether supervenient coverture could be added to infancy existing when the cause of action accrued.

The same question arose in *Demarest v. Wynkoop*, 3 Johns. Ch. 129, where it was sought to add the disability of coverture to that of infancy; but the able and learned Chancellor KENT said: "I am clearly of the opinion that the party can only avail himself of the disabilities *existing when* the right of action first accrued. * * * Cumulative disabilities cannot be allowed." In that case it was said by the chancellor: "It would be impolitic, as well as contrary to established rule, to depart from the plain meaning and literal expression of the proviso in the statute of limitations. We cannot well misapprehend the meaning of the legislature. The party bringing himself within the proviso must be, '*at the time* such right or title *first descended or accrued*, within the age of twenty-one years, *feme covert*, insane or imprisoned,' and he must bring his action within ten years '*after such disability removed*.'" It was said, in the same case: "General words in the statute must receive a general construction, and if there be no express exception, the court can create none."

So, in *Butler and Wife v. Howe*, 13 Me. 397, it was held that if several disabilities exist together, at the time when the right of action accrues, the statute of limitation does not begin to run until

the party has survived them all. But, under the statute, a party cannot avail himself of a succession of disabilities, but only of such as existed when the right of action first accrued.

And so it was held by the Supreme Court of the United States, in *Mercer v. Selden*, 1 How. 37, Justice MCLEAN delivering the opinion of the court. The syllabus on this point is: "Disabilities which bring a person within the exceptions of the statute cannot be piled one upon another; but a party claiming the benefit of the proviso can only avail himself of the disability existing when the right of action first accrued."

Many other cases might be cited in which the statute has received a similar construction by the courts of last resort in our sister States. Among others are the cases of *Dugan v. Gittings*, 3 Gill (Md.), 138; *Doe, ex dem. Caldwell, v. Thorp*, 8 Ala. 253; *White v. Latimer*, 12 Tex. 61; *Clark v. Jones*, 16 B. Monr. 121; *Ashbrook v. Quarles' Heirs*, 15 id. 20; *Clay's Heirs v. Miller*, 3 Monr. 148; *Wellborn v. Weaver*, 17 Ga. 267; *Keeton's Heirs v. Keeton's Admr.*, 20 Mo. 530; *Thompson v. Smith*, 7 Serg. & R. 209.

In the case last cited the question was considered by TILGHMAN, C. J., with reference both to the policy of the statute and the words of the proviso, or exception; which it was held could not be extended on grounds of equity.

In this State it was held, in *Lessee of Whitney v. Webb et al.*, 10 Ohio, 513, that successive disabilities in different persons, as ancestor and heir, could not be connected, and that the heir, whether under disability or not, must bring his action within the time allowed by the proviso, after the death of the ancestor. And such, no doubt, is the settled construction of the statute. In *Carey's Admr. v. Robinson's Admr.*, 13 Ohio, 181, LANE, C. J., in delivering the opinion of the court, took occasion to say (page 197), that a proper construction of the statute "does not permit one disability to be connected with another, of either the same or a different kind, but it secures the right of pursuing a cause of action after the *first* privilege has expired, or the *first* disability has been exhausted." The question in that case was different from the one we are considering here, still this expression is indicative of the opinion of that jurist on the point before us.

It is quite true that a different construction of the English statutes of limitation had obtained in that country, and is main-

tained by reputable English text-books. 2 Preston on Abst. of Title, § 339; Sugden on Vendors.

There is a difference between the phraseology of the American statutes of limitation in general and the statute of 21 Jac. 1, and this difference is more marked in the case of the statute of fines, of 4 Hen. 7. Whether there is such a difference in the phraseology as would justify the apparent difference of the construction in the two countries it is not worth while to inquire; for we think the construction almost universally given by the courts of this country best comports with the policy of the statute, which is that of repose, and with the legislative intent, as manifested by the plain and clear terms of the proviso, or second section of the act.

The first section of the act expressly limits the time within which an action may be brought for the recovery of the possession of lands to twenty-one years after the accruing of the cause of action. This provision, standing alone, would, as against *all* persons, bar the right of action after twenty-one years.

But from this universality of application the second section makes an exception, in favor only of persons who, *at the time* their cause or right of action *first* accrued, were under some one or more of the four disabilities, to wit, infancy, coverture, insanity, and imprisonment. It is very clear that no such disability will bring any person within the operation of this section, unless it *exist* at the time when the cause of action *first* accrues. If a party is *then* free from disability, the time given by the first section begins to run, and its flow will not be interrupted by a disability arising subsequently. The case will be governed solely by the first section.

But if any of the specified disabilities exist when the cause of action first accrues, then this second section allows the person so under disability "to bring such action within ten years after *such* disability is removed," though the twenty-one years given by the first section shall have previously expired. And the question is, to what does the word "*such*" refer, in the expression "after *such* disability is removed?" It was evidently intended to refer to some disability previously mentioned. But no disabilities are spoken of in the former part of the section except those which existed when the right of action first accrued. The fair and natural construction therefore is, that the action must be commenced within ten years after the removal of the disability or disabilities which, by their

existence at the time when the right of action first accrued, brought the case within the operation of this section.

What persons, or cases, a wise public policy should except from the operation of the general bar of the statute, and what should be the duration of such exceptions, are questions for legislative, not judicial consideration. We can enforce no exceptions unwarranted by the plain words of the statute.

It is obvious that the section we have been considering can have proper application only where an action is brought after the expiration of twenty-one years from the time the right of action accrued. And in such a case, so far as this statute is concerned, the only question is: Was the plaintiff, or one under whom he claims, at the time the right of action first accrued, under any statutory disability, which continued, without interruption, till within ten years of the time when his action was commenced? In the present case this question must, confessedly, be answered in the negative. At the time the plaintiff's right of action first accrued she was under the disability of infancy only. She became of full age in 1848, and did not commence her action till 1865, when the bar of the statute was complete.

As this is fatal to the plaintiff's case, we do not find it necessary to consider the other defenses interposed by answer in the Court of Common Pleas.

It may be proper, however, to say that we think the facts stated in the answer, and found by the court to be true, were sufficient to divest the plaintiff of all *equitable* interest, at least, in the premises, and of the right of possession. The facts in the case are briefly these: In 1838 the premises in question were regularly sold by the administrator of the estate of plaintiff's father, who had previously died intestate. The sale had been previously ordered by a court of competent jurisdiction, in a statutory proceeding for that purpose, to which the plaintiff and all other necessary parties were duly made defendants. The property, embracing the premises in controversy, was sold for \$2,400; and this sale was duly confirmed by the proper court, and a deed ordered to be made to the purchaser on his compliance with the terms of the sale.

The administrator was thereby invested with full power, under the statute, to convey to the purchaser, upon the payment of the purchase-money, all the interest of the plaintiff in the premises, whether legal or equitable. But the terms of sale were not fully

complied with, by the purchaser, and such deed was therefore not delivered. Partial payments of purchase-money, either by the purchaser or his assignee, appear to have been made, up till 1842, amounting in the aggregate to some eight or nine hundred dollars. In this state of the case, perhaps, the administrator might have rescinded the sale, by refunding the moneys received thereon. But he chose, as he well might do, to enforce the payment of the purchase-money remaining unpaid. He did so, in 1842, by a proceeding in equity, in which the purchaser and his assignee were made defendants, and in which he obtained a decree for the sale of all the equitable interest of the defendants in the premises, for the satisfaction and discharge of the residue of purchase-money remaining unpaid, which the court found amounted to some \$2,000, including accruing interest till that time. To this proceeding in chancery to subject the interest of the purchaser and his assignee to sale the plaintiff was not a necessary party.

A sale was made, by a master in chancery, pursuant to the terms of this decree, from which \$2,400 were realized. This sale was confirmed by the court, and a deed was ordered to be made and was in fact made by the master to a purchaser, under whom the defendant in this case claims title. From the proceeds of this sale the original purchase-money, with the interest thereon, was fully paid, and came as assets into the hands of the administrator. We think the purchaser at this judicial sale took, by virtue of the master's conveyance, at least all the equitable rights of the parties to the suit.

The purchase-money having been fully paid, we think the purchaser at the judicial sale had a right to demand of the administrator a conveyance of all the interest and title of the heirs of his intestate in and to the premises. Whether such was the *legal* effect of the deed made by the master it is unnecessary to inquire.

If a title of any kind remained in the plaintiff, it was certainly one which gave her no equitable right to recover possession of the premises; and we think she has no cause to complain of the judgment of the Court of Common Pleas, as modified by the District Court.

Judgment of District Court affirmed.

STATE V. EASTER.

(30 Ohio St. 542.)

Criminal law—murder—plea—relation of grand juror to deceased.

It is not a good plea to an indictment for murder, that a member of the grand jury which found such indictment was a nephew of the person who was murdered.*

INDICTMENT for murder. The opinion states the facts.

John K. Billings, for the State.

E. P. Evans, for defendant.

WRIGHT, J. James Easter, indicted for murder in the first degree, plead in bar that Jabez Eagle, one of the grand jurors who found the indictment, was the nephew of Simon Osman, the murdered man; and hence it is claimed that this grand juror was disqualified.

This plea was demurred to by the prosecuting attorney. The demurrer was overruled and exception taken. The question, therefore, is, was the grand jury disqualified by reason of his relationship to the person murdered.

The qualifications of grand jurors are thus prescribed (S. & S. 410): They must be "good judicious persons, having the qualifications of electors and not exempt by law from serving as jurors."

It is not denied but that the juror in question had all these requisites. By what authority, therefore, shall we add another to those the statute has prescribed? The law has declared that certain qualifications are necessary. Can we go farther, and say the grand juror must also be no kin to those injured by the accused? A moment's consideration will show that this would be imposing absurd and impossible conditions. The grand jury do not know who will be accused before them, and if, upon a case being presented in which an injury has been done to some relation of a member of the jury, that member is to be disqualified, it may be necessary to have a new grand jury for every crime committed.

* See *Rolland v. Commonwealth* (33 Penn. St. 306), 22 Am. Rep. 756.

It is not necessary for us now to decide what objections might be raised, as against the grand jury, by challenge before they are impanelled and sworn. The case before us is upon a plea to an indictment already found, and the books seem to hold that the right of objection depends in a great measure upon the time it is made.

In 1 Wharton's Crim. Law, § 469, it is said to be a cause of exception to a grand juror that he has formed and expressed an opinion as to the guilt of a party whose case will probably be presented, but the objection must be taken before, and will not be heard after indictment found. It is so held in *People v. Jewett*, 3 Wend. 314, where it is said by SAVAGE, C. J., that "such objection, to be availing, must be made previous to the juror being impanelled and sworn."

In *Tucker's Case*, 8 Mass. 286, it was suggested by *amicus curiæ*, that a grand juror was a neighbor of the accused and had originated the complaint against him, and the suggestion also was made before the juror was sworn. The objection was not, however, sustained by the court.

Commonwealth v. Clark, 2 Brown, 315, was a case where the challenge was allowed before indictment found.

In Illinois, it seems that the common law governs as to the time, manner, or causes for which grand jurors may be challenged. It is there held (*Musick v. People*, 40 Ill. 268), that the right to challenge exists and may be exercised by any person charged with crime, whose case is likely to be made the subject of investigation. In this case the attorney for the accused made a motion to have the grand jury brought to the bar of the court, for the purpose of having it purged of members alleged to have expressed an opinion that defendant was guilty. Before the motion was taken up for hearing, the jury came into court to make presentments. The motion was called up and arguments heard; whereupon the court inquired whether the grand jury had acted in the case, and was informed they had, and were ready to report a bill. Upon this the court overruled the motion, and exception was taken. The court are of opinion that, although there is no doubt as to the right of challenge, yet the time when that right must be exercised is not so well determined. It is further stated that it does not seem to have been held in England that the expression of opinion by a grand juror that the prisoner was guilty, was ground of challenge, and

the court incline to the opinion that it forms no ground of challenge, but say that even if it were so, the objection should have been made before the oath was taken.

In *State v. Quimby*, 51 Me. 395, before arraignment, the defendant made a motion, in the nature of a plea in abatement, to quash the indictment because one of the grand jurors was a postmaster. By the statutes of Maine, certain persons are "exempted from serving as grand jurors," among whom are "all officers of the United States." In this case the court holds that statutes of this kind do not disqualify, but simply excuse jurors; that the exemption is a personal privilege, which furnishes no ground of challenge. No point seems to have been made as to the time of objection being made, or that it was after the indictment found.

The same holding is found in *State v. Forshner*, 43 N. H. 89, where, upon a motion for a new trial, a cause for exemption was held not to disqualify a grand juror.

In *United States v. White*, 5 Cranch, 457, the syllabus is: "That one of the grand jurors who found the indictment had previously expressed an opinion that the defendant was guilty of the offense, is no ground for a plea in abatement of the indictment."

"Exceptions to grand jurors for favor are only cause for challenge before they are sworn, or before indictment found, not for a plea in abatement."

In Indiana, it is permitted to the accused to challenge members of the grand jury before they are sworn. *Jones v. State*, 2 Blackf. 476; *Hudson v. State*, 1 id. 318; *Ross v. State*, id. 390.

The cases in Indiana limit the right to challenge, to those under prosecution for crime; but in *United States v. Blodgett*, 35 Ga. 337, it is held that grand jurors may be challenged by any one affected by their finding, and that the right is not restricted to those charged with crime, but may be exercised by any one who has been warned by the prosecuting attorney that he will be subjected, during the term, to an indictment.

In *The State v. Clarissa*, 11 Ala. 58, it is held: "The grand jury cannot be called and required to expurgate themselves of any supposed interest, or bias, at the instance of one in jail and expecting an indictment to be preferred against him. Objections to the grand jury must be taken by plea in abatement, at the term at which the indictment is found." See, also, *State v. Hughes*, 1 Ala. 658.

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In *Commonwealth v. Smith*, 9 Mass. 107, there was a plea in abatement to the indictment, averring that one of the grand jurors was a Quaker, and so disqualified. It is held that objections to the personal qualifications of a juror must be made before the indictment found, and that such objections may be received from any person who is under presentment for crime, or from one as *amicus curiæ*.

Commonwealth v. Parker, 2 Pick. 550, commenting on the preceding case of *Commonwealth v. Smith*, doubts the proposition that objections to the personal qualifications must always be made before indictment found. 1 Chit. Criminal Law, 307; *State v. Herndon*, 5 Blackf. 75; *Thayer v. The People*, 2 Dougl. (Mich.) 417. The questions relating to grand jurors are elaborately discussed by DILLON, J., in *State v. Ostrander*, 18 Iowa, 438, and also in *United States v. Williams*, 1 Dillon's C. C. 486. See, also, 1 Bish. Crim. Jur., §§ 853, 875 and 881, and 1 Whart. Crim. Law, § 489 *et seq.*; *State v. Reid*, 20 Iowa, 414; *Breeding v. State*, 11 Tex. 257; *Glas-singer v. State*, 24 Ohio St. 206; *Meeks v. State*, 57 Ga. 329.

In *State v. Rockafellow*, 1 Halst. 332, it is held that it is a good plea in abatement to an indictment, that one of the grand jurors, by whom the indictment was found, was not a freeholder, as he is directed to be by the act of assembly. In that case the court say: "It is surely proper time, and certainly early enough, for the accused to except to the qualifications of the indicters after the bill has been presented against him. He then knows, or can be informed who they are; he has time to ascertain their qualifications and his own means of proving the exceptions which he may be advised to take; and we are unable to perceive any grounds upon which he can be fairly deprived of his plea to their incompetency."

And in speaking of the right to challenge, the court say: "No mode is pointed out in which the exception is to be taken, and we consider that as the most correct mode which, without being otherwise peculiarly repugnant to the principles or policy of the law, is best calculated to give effect to its humane and salutary provisions. If the mode by challenge is to be adopted, it must necessarily result that nine times out of ten the benefit of a statute, which provides a security for our lives, fortunes and reputation, by requiring that an indictment shall always be presented by jurors, respectable for their character and standing in society, shall be absolutely lost to the accused, without any actual neglect or default

of his own. It frequently occurs that the accused is altogether ignorant of the complaint when the grand jury is called; if he should chance to be present he cannot be assured that the prosecution will proceed; and, at any rate, it would be most extraordinary for him to make his challenges when there is no certainty that his case will come under their cognizance. In most cases of a capital nature the person charged with the offense is actually in confinement, and has not physical capacity to make his challenges; he is never brought up and confronted with the grand jurors; nor is he served with a list of the persons who are to compose it. Thus circumstanced, it would be worse than a form—it would be a mockery of law and justice—to compel him to avail himself of exceptions of this kind, or to be considered as forever waiving every error in the proceedings of the sheriff.”

But in the case of *State v. Rickey*, 5 Halst. 83, a plea in abatement that two of the grand jury had, before they were sworn, formed and expressed an opinion unfavorable and prejudicial to the defendant, was held bad on demurrer. The court say that this is “a challenge to the favor and comes too late. In this case of *Col. Barr*, the challenges to the grand jurymen were all taken *before they were sworn*. The case of the *State v. Rockafellow*, 1 Halst. 343, was not a challenge to the favor; it was a matter of *principal* challenge for want of a leading qualification required by the statute; and, though I subscribe to the doctrine of the court there delivered, and do not see how the court could have done otherwise *upon the facts admitted by the demurrer*, it may lead to very inconvenient results, if carried a single inch beyond the precise circumstances of that very case. If such a plea should be traversed, the court might find great difficulty in permitting those very *counsels* of the grand jury room to be pumped out of witnesses by the force of their authority, which had just before been employed in imposing an oath on each grand jurymen to keep secret. And that not to elicit the evidence of a *crime*, in which public justice was concerned, but to establish a mere irregularity for the purpose of arresting a public prosecution, and when the defendant was as likely to be guilty as if the irregularity had never happened. But without meaning to disturb that case, my impression is that it has no bearing on the present; and in the absence of all cases, I find no principle on which to maintain the present plea. But, on the other hand, I find much against it. The matter is a challenge to the polls

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for favor, which the law always requires to be made before the jury is sworn, and here it is not made till after he has sworn and acted. If taken at the proper time, it will only remove the juror and allow of another in his place; but, if allowed in this shape, it will invalidate the proceedings of all the other good and unexceptionable men on the jury. If taken at the proper time, the question whether the juror was indifferent or not would have been tried by the *triers*, but if taken in the form of a plea in abatement, the *established* mode of trial will be changed for that of a jury of twelve men. It is the most expensive form in which the matter can be presented, and the policy of the law requires it to be done in a summary way. It may be used as an engine of great delay, so that a new indictment may be impracticable on account of the statute of limitations, before the old one comes to be quashed, and guilty offenders will, if they are able, seek impunity under it for their crimes, and make it a refuge against public justice, turning it to ridicule and contempt. Finally, there is no such plea as this to be found among the records and monuments of the law; it is *sui generis*, not alone without precedent (whereof the books have been filed, if past ages had deemed such matter pleadable), but contrary to all precedents which are the other way. Such are the reasons as they occur to me at present for adopting the general conclusion that this plea is inadmissible in all its parts."

In *Doyle v. State*, 17 Ohio, 222, it was specially plead to the indictment that one of the grand jury had not the qualifications of an elector, and this was held to be a good plea in bar.

This plea, it will be observed, challenges the competency of the juror to sit at all, in any case, and therein differs from the case at bar, which is simply a challenge to the favor in the particular case. Of *Doyle's case*, however, we are disposed to speak, as did the court in *5 Halstead*, the doctrine may lead to inconvenient results if carried a single inch beyond the precise circumstances of the very case.

It will be observed that the authorities are not entirely uniform on this subject, but we confine our ruling in the present case to the simple proposition that the objection cannot be made upon a plea to an indictment whatever might be properly urged at an earlier stage of the trial.

It is claimed by counsel for Easter that the qualifications of a grand and petit juror are the same. The position is not tenable.

Both must have certain things. Both must be good and judicious persons ; both must be electors. But there are other requisites for the petit juror not necessary for the other. The various laws on the subject lay down quite a number of causes for which the petit juror may be challenged. They are too numerous to repeat, but may be found in 1 S. & C. 754 ; 66 Ohio L. 307 ; 68 id. 4 ; 69 id. 11. A brief examination of some of these causes of challenge show that they cannot apply to the members of the grand jury. The first is 69 Ohio L. 11, that the party called as a juror was a member of the grand jury who found the indictment. It is obvious that this must apply to the petit jury who tries the case, and no other. The second is, that he has formed or expressed an opinion as to the guilt or innocence of the accused. How can this apply to the grand jury, when they do not know who the accused will be?

Or, again, that he is related within the fifth degree, to the persons injured. This also presupposes a knowledge on the part of the grand jury who the person injured is.

Or, again, if these causes apply to the grand jury, when are the challenges for such cause to be made? Who is to make them? As each case is presented to the grand jury, are the members to be catechised as to their qualifications? Suffice it to say, that these causes of challenge lie specifically to the jurors called to try the indictment. Such is the language of the statute.

The oath taken by the members of the grand jury throws some light upon this question (1 S. & C. 753):

“Saving yourself and fellow-jurors, you shall diligently inquire and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. * * * * You shall present no person through malice, hatred, or ill-will; nor shall you leave any person unrepresented through fear, favor or affection, or for any reward or hope thereof.”

This language seems to indicate that the grand juror may be called upon to act in cases both of enemies and friends. If the first, his oath is that neither malice, hatred, nor ill-will shall influence his deliberate and impartial judgment. If the last, no considerations of passion or friendship shall disturb the just discharge of his duties.

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The grand jury only presents the charge against an accused person; it does not try that charge. This is for the petit jury, and it is well enough that they are subject to the variety of challenges above specified; but as to the grand juror, his qualifications are simply those the statute has specified.

Exceptions sustained.

FIRST NATIONAL BANK OF BARNESVILLE V. TELEGRAPH CO.

(30 Ohio St. 555.)

Negligence — telegraph — damages — intervening cause.

In case of a breach of contract, actual damages not being proved, nominal damages may be recovered.

In case of failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties, at the time the contract was made.*

If the telegraph company is in default, but their default is made mischievous to a plaintiff only by the operation of some other intervening cause, such as the dishonesty of a third person, the rule "*causa proxima non remota spectatur*" applies, and the company cannot be made responsible for the loss occasioned by the act of such third person.

ACTION of damages for failure to transmit and deliver a telegraphic message. The opinion states the facts.

J. H. Collins, for plaintiff in error.

J. W. Okey, with whom was *A. J. Swaney*, for defendant in error.

WRIGHT, J. The First National Bank of Barnesville brought an action in the court below, against the telegraph company, to recover damages, for failure to transmit and deliver a telegraphic message. The bank was located in Barnesville, Ohio. It had done business with one Aaron Lowshe, and had frequently cashed drafts for him, in a small way, prior to February, 1869. In that month,

* See *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263; 4 Am. Rep. 673; *Western Union Telegraph Co. v. Graham*, 1 Col. 339; 9 Am. Rep. 126 and note, 142; *Tyler v. Western Union Telegraph Co.*, 60 Ill. 421; 14 Am. Rep. 38; *Hubbard v. Western Union Tel. Co.*, 33 Wis. 558; 14 Am. Rep. 775; *Manville v. Western Union Tel. Co.*, 37 Iowa, 214; 18 Am. Rep. 8; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; 20 Am. Rep. 695.

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Lowshe wanted two more drafts cashed, one on Bellis & Milligan, New York, for \$1,600; one on Ege & Otis, same place, for \$1,400. The amounts being large, and the bank cautious, the cashier wrote to a correspondent in New York, George F. Baker, cashier First National Bank, New York, as follows:

"Would like information in respect to Messrs. Ege & Otis, No. 168 W. W. Market; also, Messrs. West, Titus & Co., No. 129 West street. Are they responsible parties? If not too much trouble, would be pleased to have you inquire of each, if dft., at sight, drawn by A. Lowshe for \$1,400 to \$1,600 would be paid. If the firms, or either of them, are not reliable for that amt., or if they should be unwilling to accept, please answer by telegram. If all right, need not dispatch. If not right, would like to hear by Saturday evening (13th)."

This letter was dated at Barnesville, February 11th, which appears to have been Thursday. No mention is made, it will be observed, of Bellis & Milligan, on whom the \$1,600 draft was drawn.

The letter was received in New York, by Baker, to whom it was addressed, on February 15. It is stated in evidence that the ordinary time of mail communication, between Barnesville and New York, is two days. This advice to Baker probably reached its destination after close of bank hours, on Saturday, and was taken up in the ordinary course of business on Monday morning. On that day Baker made inquiries of Ege & Otis, on whom the \$1,400 draft was drawn, and at 4:55 of that day telegraphed as follows, to the bank at Barnesville:

"February 15, 1869.

"To J. F. DAVIS, *Cash., Barnesville. O.*

"Parties will accept if bill lading accompanies the draft. Parties stand fair.

GEO. F. BAKER, C."

This message never was received at Barnesville. There is testimony tending to show that it started to and perhaps reached Buffalo. But it is not traced beyond that point, and the telegraph company give no satisfactory account of what became of it. The one certain fact about it is, that the Barnesville bank never received it. New York not being heard from, the Barnesville bank cashed the drafts, on Monday the 15th, before three o'clock, the hour at which business closed. Lowshe, the drawer, had no money

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in New York at all, either in the hands of Bellis & Milligan, or Ege & Otis, and having accomplished his financial transaction at Barnesville, left the same day for Zanesville, and from thence to other places more remote. The Barnesville bank now claims that the \$3,000 was a total loss; and that this loss is chargeable upon the telegraph company, in not sending and delivering the dispatch. They therefore claim to recover this amount in this action.

In the first petition of the bank it is stated that the drafts were discounted between two and three o'clock on the 15th, which would not have been done had the dispatch been reasonably delivered. The answer of defendant, however, showed that the dispatch was not delivered in New York until 4.55; it is therefore entirely obvious that no omission or neglect on the part of the telegraph company could have prevented the cashing of the drafts.

In the last petition of the bank it is said:

"The said drafts were a total loss to said plaintiff, no part thereof having been paid, which said loss would have been prevented if said defendant had forwarded and delivered said dispatch to said plaintiff within a reasonable time after it was received by said defendant at its said office in New York city, as aforesaid.

"If said dispatch had been delivered to said plaintiff before said drafts were discounted the same would not have been discounted, and if it had been delivered to said plaintiff within a reasonable time after the same were discounted, the said sum of \$3,000 could have been recovered back by said plaintiff from said Lowshe."

In the view we take of the case the sole question that need be decided is the one of damages. As has been said, had the dispatch been duly sent and received it could not have prevented the bank from giving Lowshe the money; that had already been done. Had it been delivered, however, within any reasonable time, after receipt at New York, then what would have happened? Plaintiffs below say they could have recovered back the amount from Lowshe, and therefore they lost their \$3,000 by the negligence of the defendant. The petition does not state how or in what manner they could have recovered the money, but merely asserts the fact to be so. The only facts in evidence showing any intention to take steps to recover the money, or intimating how it was to be done, is the following from the cashier, Davis:

"Q. Would there have been any trouble in the bank giving security in Zanesville in any proceeding to recover the money?

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[Objected to.]

"A. I think not.

"Q. State whether, if this message had been received by the bank during the afternoon or evening of February 16, 1869, any means would have been used to recover the money; if so, what?

"A. I am confident means would have been used to recover it."

Mr. Lowshe also makes this statement:

"Q. If the bank had discovered, while you were at Barnesville or Zanesville, that those drafts which you had cashed at the Barnesville bank would not be accepted, and had demanded the money back, would you have refunded it to the bank?

"A. At Zanesville, on the afternoon of the first day there, I sent five hundred dollars of the money home. Had the bank informed me at Barnesville the drafts would not be accepted, I would have returned the money to the bank. Had such information reached me at Zanesville, before I sent the five hundred dollars home, I would have returned it all. Had such information reached me at Zanesville, after I sent the five hundred dollars home, I would have returned the balance to the bank. I would have returned the money immediately on receiving such information."

In this connection the court charged the jury in effect, that if defendants were guilty of negligence in not transmitting the message, then plaintiffs must show that Lowshe was where they could have reached him with legal process and that he had property in such position that the law could lay hold of it; and if this was not shown, but it appeared that the recovery of money depended upon the happening of a new contingency which might or might not have occurred, the damages were so remote that no recovery could be had.

Upon the case as thus made we are clearly of opinion that the plaintiff was not entitled to substantial damages.

If the New York dispatch had arrived upon the 15th or 16th, it is not made apparent, either in pleadings or proof how the bank was to secure itself, with that certainty the law requires, in order to justify a claim for damages. It is not made to appear that Lowshe had property that could be seized. He had obtained this money, it is true, and perhaps might have had it in his possession, but he might easily have put it beyond the reach of process. But even if he had the money where he could lay his hand upon it, it is not pointed out how the bank proposed to reach it. Had he been arrested on

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the ground of fraud, it might have been difficult to sustain such a proceeding, until after the drafts had been actually protested for non-acceptance, by which time Lowshe was lost sight of. Nor is it alleged or proved that an actual arrest would have produced the money. It is true, the bank claims that Mr. Lowshe would have returned the money, because he said he would; still the jury might have considered that as the "mere contingency," which the court instructed them, only occasioned a damage that was remote.

The rule as to damages is thus laid down by EARL, J., in *Leonard v. Tel. Co.*, 41 N. Y. 544; 1 Am. Rep. 446: "The damages must flow directly and naturally from the breach of contract, and they must be certain both in their nature and in respect to the cause from which they proceed. Under this rule, speculative, contingent, remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule, such damages are only allowed as may fairly be supposed to have entered into the contemplation of the parties, when they made the contract, as might naturally be expected to follow its violation. It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be fairly *supposed* to have contemplated when they made the contract. A more precise statement of the rule is, that a party is liable for all the direct damages which both parties would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts." See, also, *Kinghorne v. Mont. Tel. Co.*, 18 Up. Can. Q. B. 60, and *Stevenson v. Mont. Tel. Co.*, 16 id. 530; *Squire v. West. Union Tel. Co.*, 98 Mass. 232.

This is substantially the rule as laid down in *Hadley v. Baxendale*, 9 Exch. 341, and in considering what damages may be supposed to have been fairly within the contemplation of the parties, there was nothing in this dispatch to inform the telegraph company of the serious consequences that are now presented. There was absolutely nothing in the language of the message advising the company that it was to prevent the cashing of \$3,000 worth of drafts. *Hadley v. Baxendale*, and numerous authorities, hold that before a party can be charged with such special and peculiar damages as are were claimed, he must have had notice that they were likely to arise from a breach of his contract.

In *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 423, the message was to

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attach property. This was of itself notice that if the attachment was not procured, the loss of the debt might follow.

Bryant v. Am. Tel. Co., 1 Daly, 575, was, like the last, a case where an attachment was directed.

In *U. S. Tel. Co. v. Wenger*, 55 Penn. St. 262; Allen's Tel. Cas. 356, there was an order to buy stocks, which was delayed. The stocks rose in value, and the telegraph company were held responsible for the difference. And it is said by the court that the dispatch was such as to disclose the nature of the business to which it related, and the loss might be very likely to occur if there was delay in sending the message.

Upon the other hand in *Baldwin v. Tel. Co.*, 54 Barb. 505; 1 Lans. 125; 45 N. Y. 744; 6 Am. Rep. 165, the syllabus is: "If a telegram does not show upon its face that it relates to a business transaction, and that a pecuniary loss may probably be sustained if a mistake is made in transmitting it, and no notice to this effect is given to the telegraph company, the company making such mistake will not be liable in damages for such loss."

In *Landsberger v. Mag. Tel. Co.*, 32 Barb. 530, it was held that plaintiff could not recover damages, because, "on receiving the dispatch for transmission, the defendant had no information whatever in relation to it, or the purposes to be accomplished by it, except what could be derived from the dispatch itself."

In *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; Allen's Tel. Cases, 390, it is held that knowledge of special circumstances must be shown to lay a foundation for special damages. *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530, 537. The telegraph cases generally follow the rule of *Hadley v. Bazendale*, with regard to notice, as is shown by the numerous authorities cited by counsel.

It therefore appears to us that the possibility of recovering the money from Lowshe was a contingency too remote upon which to base a recovery. The fact that the company were not advised of any importance attaching to the message, either by the message itself or actual notice given, goes further to show a case where substantial damages cannot be recovered.

And in this connection, and as relating to the question of damages, we may consider the rule, "*causa proxima non remota spectatur*," as to which Parsons says (vol. 2, p. 257 — *Telegraphs, Measure of Damages*): "If the telegraph company is in default, but their default is made mischievous to a party only by the operation

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of some other intervening cause, then the rule above mentioned would prevent the liability of the company; because their default would only be the *remota*, the remote or removed cause of the injury, and not the *proxima*, or nearest cause."

If the telegraph company were guilty of negligence in not delivering the message at Barnesville, the question remains, whether there would have been a loss if there were no other cause intervening. Clearly the failure in the message was not the moving cause that induced Lowshe to obtain the discounts and pocket the money; neither would the delinquency of the telegraph company have occasioned any damage had Lowshe evidenced that integrity which, in a virtuous mind, would have induced the return of the money to the bank. The loss was occasioned by two causes—the short-coming of the telegraph company, in not delivering the message, and the still shorter-coming of Lowshe, in appropriating to himself what belonged to somebody else.

In *Lowery v. Western Union Telegraph Co.*, 60 N. Y. 198; 19 Am. Rep. 154, B sent a telegram to plaintiff, asking for \$500; by mistake the telegraph company changed the message to \$5,000, which B obtained, embezzled, and absconded. The referee held the telegraph company liable for the loss in the whole amount. This was held error; that defendant's negligence was not the proximate cause of the loss, as the embezzlement of B did not naturally result therefrom, and could not reasonably have been expected.

In this case, the court, quoting from *Crain v. Petrie*, 6 Hill, 522, lay down this rule: "To maintain an action for special damages they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third person induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of."

In any aspect, therefore, in which we are able to view the case, we cannot but consider that the damages are too remote to uphold recovery to any substantial amount.

But the plaintiff was entitled to recover nominal damages. Upon the breach of an agreement, the law infers damages, and if none are proved, nominal can be recovered. Sedgwick on Damages, 47; Field on Damages, 679; *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 435; *Candee v. Western Union Telegraph Co.*, 34 Wis. 471; 17 Am. Rep. 452.

The plaintiff asked the court to charge that, if the non-delivery

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of the message was by reason of defendant's negligence, plaintiff was entitled to nominal damages if there were no actual damage. This was refused, and the court did charge that there was no right of action, unless injury was shown. This was error, for which the judgment must be reversed.

[Omitting a point of pleading.]

Judgment reversed.

 LODGE V. WHITE.

(30 Ohio St. 569.)

Landlord and tenant — assignment of lease — covenant to pay rent.

A lessee remains liable on his express agreement to pay rent, notwithstanding he may have assigned his lease with the lessor's assent, and the lessor has accepted rent from the assignee.

But where the obligation of the lessee to pay rent is only that which is implied by law from his occupation of the premises, his assignment of the lease and surrender of possession to the assignee, with the assent of the lessor, extinguishes the privity of estate between the lessor and lessee, and the consequent implied liability of the lessee to pay rent.

The assent of the lessor to such assignment, where nothing to the contrary appears, may be implied from his charging the rent to the new tenant and accepting payment thereof from him. (*See note, p. 494.*)

ACTION for rent. The opinion states the facts.

Sage & Hinkle, for plaintiffs in error. A lessee cannot discharge himself of his obligations by assigning the lease. He remains liable upon his original contract after his assignment, and may be sued on it even if the landlord has accepted the assignee as his tenant and collected rent from him. 2 Platt on Leases, 352; Smith's Land. and Ten. 293; Taylor's Land. and Ten., § 438, and cases; *Sutliff v. Atwood*, 15 Ohio St. 186; 1 Chit. on Cont. 460, note k.

King, Thompson & Maxwell, and *Charles T. Thompson*, for defendants in error.

DAY, C. J. The record, upon the exceptions taken in the court below, presents a single question for our determination: Was the judgment in favor of the defendants warranted by the facts found?

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By a parol agreement between the parties, the plaintiff leased the premises to the defendants for one year from July 1, 1868, at a rent of \$3,500, payable in monthly installments.

About the time of the expiration of the lease, and again a year afterward, the parties negotiated for a new lease, differing in the term and amount of rent; but, upon the facts found, we think the court below might well hold that their minds never met in agreement upon a new lease, and that by reason of the continued possession of the premises by the defendants after the expiration of the lease for one year, and the acceptance of monthly payments by the plaintiff at the same annual rent, the defendants were to be regarded as tenants holding over from year to year. This view of the case is the only one consistent with all the facts found. They fail to establish an express lease for the period in question. The possession of the defendants does not imply an acceptance of the proposition of the plaintiff for a lease of two years, for it was referable solely to the original lease; and the application of the defendants for a reduction of the rent the following year evinces their non-acceptance of the lease proposed, even if the proposition came to their knowledge. But where a tenant holds over by the consent of the lessor, the law presumes the holding to be upon the terms of the original lease.

The defendants then being in possession under the implied lease from July 1, 1870, to July 1, 1871, on the first day of November, 1870, gave up the premises to the new firm of L. A. Corbin & Co. From that time the plaintiff received the rent from the new firm, so far as it is shown to have been paid; and for that of November, 1870, the plaintiff, by its proper officer, made out a bill charging the new firm as its debtor therefor, and gave a receipt for that monthly installment to the new firm.

The plaintiff, then, must be presumed to have known that the defendants had assigned their lease to the firm of L. A. Corbin & Co. With that knowledge the new firm was treated as the tenant of the plaintiff. We cannot, therefore, say the court below was not warranted in holding that the plaintiff, as a matter of fact, consented to the assignment. There being nothing to the contrary, the facts found *prima facie* warranted the conclusion that such assent was given.

But the defendants were not tenants by virtue of an express agreement when they assigned to the new firm. They were hold-

ing over from year to year only upon such terms as were implied by law. Their obligation to pay rent to the plaintiff was implied from their possession of its premises. When their possession ceased, and the plaintiff received rent from another tenant in possession upon his implied promise arising therefrom, that of the defendants could no longer be implied, for there was no privity of estate between the parties on which it could be based.

Had the tenancy of the defendants been in pursuance of an express lease they would, undoubtedly, have remained liable, by virtue of the personal privity of the contract, notwithstanding their assignment of the lease. 2 Platt on Leases, 352.

But this rests on a principle applicable only to leases by express agreement. In 1 Washburn on Real Property, 493 (4th ed.), it is said: "There is an important distinction to be observed between express and implied covenants in a lease, since one who enters into an express covenant remains bound by it, though the lease be assigned over, while such as are implied are co-extensive only with the occupation of the premises; the lessee, for instance, not being liable under his implied covenant for rent after his assignment to another, and the acceptance of rent by the lessor from the assignee." The same doctrine is laid down in 2 Platt on Leases, 355; and is recognized and clearly stated by WHITE, J., in *Sutliff v. Atwood*, 15 Ohio St. 194.

Since, then, the defendants' obligation to pay rent to the plaintiff was not founded upon an express agreement, but was only that implied by law from the privity of estate between the parties, the assignment of the lease and surrender of possession to the assignees, with the assent of the plaintiff, to be implied from its acceptance of rent from the new tenant, extinguished the privity of estate between the parties, and the consequent implied liability of the defendants to pay rent.

The judgments of both courts below must, therefore, be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—This doctrine was reiterated in *Taylor v. DeBus*, 31 Ohio St. 408, in the case of a lease for ninety-nine years and renewable forever. In respect to the term the court said: "Nor does the duration of the term at all affect the obligation of such express covenant. By the common law, the liability of the lessee, on his express covenant to pay rent during the term, attached to him and his personal representative, as long as assets remained in his hands, whether the term of the lease was for one or many years, with or without a covenant for renewal, or in perpetuity. Numerous cases are reported, where the lease was perpetual or renewable forever, in which the same liability was found as in leases for a short term of years. Indeed, it

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seems, from the nature of the covenant itself, no distinction can be made on account of the duration of the term ; it is a personal engagement to pay rent *during the term* ; as long as assets can be found, the obligation may be enforced. The law imposes no limit upon the time within which covenants to pay money must mature. This is left entirely to the discretion of contracting parties."

Of the case of *Worthington v. Hewes*, 19 Ohio St. 66, the court said: "It was conceded in argument that the courts below assumed to follow the rulings of this court in the case of *Worthington v. Hewes & McCann*, 19 Ohio St. 66. We regret to say that we are unable to approve all that was said in that case by the learned judge who prepared the opinion; and yet we do not wish to be understood as overruling that decision. That was an action by the assignee of the reversion against the assignees of the term (the liability of the lessee upon his express covenant to pay rent during the term was not in issue), and it may well be doubted, whether, in an action by the assignee of the reversion against the lessee after an assignment of all his interest, a recovery could be had upon his express covenant, there being no privity either of personal contract, or of estate between the parties. See *Crawford v. Chapman*, 17 Ohio, 449; *Sutcliffe v. Atwood*, 15 Ohio St. 194, 1866.

But however that may be, the terms of the lease in that case were essentially different from those in this case. That was a lease for ninety-nine years renewable forever with a covenant to pay rent during the first fifteen years at a fixed sum annually. It further contained a covenant that at the end of the first period of fifteen years, and of each succeeding period of fifteen years, the leased premises, without reference to the improvements, should be appraised and valued by three intelligent and disinterested men to be mutually chosen or agreed to by the said parties, or in case of disagreement, then be appointed by the judges of the Court of Common Pleas of the State of Ohio within and for the county of Hamilton for the time being upon the application of either of said parties," the lessee for himself, his personal representatives and assigns covenanting that for and during the continuance of each of said successive terms of fifteen years, *he and they* should render yearly as an annual rent, etc.

Now, the main question in the case was, who was the proper party to represent the owner of the leasehold estate in the re-adjustment of the rents at the end of a period of fifteen years? The lessee or his assignees? In determining this question the court looked to the relations and interests which the respective parties had in the subject-matter, and concluded that the assignees in possession were the proper parties to act in the re-appraisalment. In construing the lease for the purpose of settling this question the court found that the lessee, after the assignment of the term, was not liable under that particular contract for the payment of rents after a re-appraisalment. The correctness of the construction of that lease is not submitted to us in this case; but it does become our duty to say that the proposition in the syllabus of that case, namely: 'After an unconditional assignment by the lessee, he is not liable for future rents, etc.,' was intended to be limited, and was in fact limited, to a lease like the one then before the court, in which the force of the express covenant to pay rent, by construction of the whole instrument, was modified and limited by other covenants.

It is enough, however, for us to say here, that we now disapprove of only so much of the opinion in that case as expresses views irreconcilable with the doctrine laid down in the decision of the case before us."

HARNER V. DIPPLE.

(31 Ohio St. 72.)

Infancy — ratification.

An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract.*

ACTION by Dipple against Harner on an undertaking for stay of execution, executed by the defendant during his minority. The defendant arrived at his majority before the stay expired, and after the expiration of the stay he acknowledged his liability, and promised to pay the amount of the judgment. The plaintiff had judgment, and defendant moved for leave to file a petition in error.

Spencer & Arthur, for the motion, cited 1 Parsons on Contracts, 295; *Keane v. Boycott*, 2 H. Black. 511; *Reeve's Dom. Rel.* 378n; 2 Kent's Com. 236; 1 Mason, 32; *Brigham on Infancy*, 23; *Swan's Treatise*, 601-2; *Baker v. Lovett*, 6 Mass. 78; *Oliver v. Houdlet*, 13 id. 237; *Whitney v. Dutch*, 14 id. 457; *Boston Bank v. Chamberlin*, 15 id. 220; *Chandler v. McKinney*, 6 Mich. 217; *Dunton v. Brown*, 31 id. 182; *Curtin v. Patton*, 11 Serg. & R. 305; *Tyler on Inf. and Cov.* 42, 48; *Passenger R. R. Co. v. Stutler*, 54 Penn. St. 380; *Story on Contracts*, § 57; *Hughes v. Watson*, 10 Ohio, 127; *Battye v. Grisley*, 8 East, 331.

Keifer & White, contra.

McILVAINE, J. The question made is, was the undertaking sued on absolutely void, or only voidable. If void, it was not subject to ratification; if voidable, merely, it may be enforced after ratification.

Having considered this question upon principle, as well as upon authority, we are constrained to hold that the undertaking was voidable only, and that after ratification it became a valid and binding engagement.

*See *Tobey v. Wood* (123 Mass. 68), 25 Am. Rep. 27, and note, 30.

In disposing of this case, we make no note of those principles which control cases where an infant, by reason of immaturity and natural incapacity, is, in fact, unable to assent to the terms of an alleged contract. When this undertaking was executed it contained every element of a valid contract, save only, that the party was under twenty-one years of age.

Except for necessities, the law grants to infants immunity from liability on their contracts. This immunity is intended for their protection against imposition and imprudence, and is continued after a majority as a mere personal privilege. This privilege of immunity, after majority, is not given because of the actual or supposed incapacity of an infant to enter into contracts intelligently and prudently. If actual incapacity existed, the privilege of infancy would not be needed for the purpose of defense. And it is contrary to our knowledge of human nature, that all infants are incapable of intelligently and prudently entering into engagements and assuming burdens. It is a matter of favor intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

But, whatever may have been the natural capacity of the infant, whenever he arrives at majority, a time fixed by an arbitrary rule which, in the nature of things, cannot affect the personal capabilities of its subject, the law presumes that he has acquired all the wisdom and prudence necessary for the proper management of his affairs; hence, the law imposes upon him full responsibility for all his acts and contracts.

In this new relation, it becomes his moral duty, and for its discharge he is invested with legal capacity, to affirm and perform, or to disavow, at his election, all his previous contracts of imperfect obligation. Contracts for necessities are of perfect obligation, and, therefore, he cannot disaffirm them. Contracts founded on illegal considerations are of no obligation, and, therefore, may not be affirmed.

The appointment of an agent or attorney to make contracts is, perhaps, inconsistent and repugnant to the privilege of infancy, for the reason, among others that might be named, that it is imparting a power which the principal does not possess; that of performing valid acts. But, outside of these exceptions, which are based on special grounds, we see no reason why the power should be denied, to ratify any contract which, as an adult, he might origin-

ally make. The power of disaffirmance being co-extensive, it is all that is needed for his protection.

If, in the case before us, the ratification had been made by payment instead of a promise to pay, its binding effect would not be doubted. Why, therefore, should not the promise to pay be binding also? There is no question about consideration. The consideration which supported the original promise is sufficient to support the ratifying promise. The only contention here is, that the original promise was void by reason of infancy, not for want of consideration. If, therefore, actual performance by payment would have been binding, so should the promise to perform; and this, too, without regard to the fact whether or not the infantile contract was beneficial or prejudicial. The principles of jurisprudence are not violated by the performance of a contract prejudicial to the party. Indeed, a person, *sui juris*, is as strongly obligated by his contracts prejudicial as by those beneficial to himself; and the same principle should apply where a person, *sui juris*, ratifies and confirms his contract of infancy.

The plaintiff in error, however, relies chiefly on the authority of decided cases, and claims the settled law to be that all contracts of an infant prejudicial to him are absolutely void, and that a contract of suretyship is of that class.

In Swan's late treatise, among contracts of infants, which have been decided to be void, is mentioned that of suretyship, but the author, in speaking of the state of the authorities, pithily and truthfully remarks, "What contracts of an infant are void and what are merely voidable, nobody knows."

Keane v. Boycott, 2 H. Black. 511, decided in 1795, appears to be a leading case. The contract of an infant was held in that case to be voidable only, but in the opinion of EYRE, C. J., a rule was stated wherein certain of such contracts are said to be void. The rule was thus stated: "When the court can pronounce the contract to be for the benefit of the infant, as for necessities, it is good; when to his prejudice, it is void; and where the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant." This rule, modified so as to declare that a contract necessarily prejudicial to the infant is void, has been adopted in many later cases, both in England and in this country. But the current of more recent decisions repudiates the distinction between void and voidable contracts, on account of their beneficial or prejudicial

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nature, and holds them all to be voidable merely; and the more recent decisions of courts still adhering to the distinction, hold some contracts voidable only, which were before held to be void. Thus, in *Owen v. Long*, 112 Mass. 403, a surety contract was held to be voidable only for the reason that such contract, as matter of law, cannot be said to be necessarily prejudicial to the surety. Also an account stated is held to be voidable only. *Williams v. Moor*, 11 M. & W. 266. Also a conveyance by lease and release. *Zouch v. Parsons*, 3 Burrows, 1794.

The following cases are to the effect that an infant's contract of suretyship is merely voidable, and may be ratified. They also show with more or less force and directness, that the distinction between void and voidable contracts of infants, on the ground of benefit or prejudice, is not sound. *Curtin v. Patton*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Barr, 428; *Patchin v. Cromach*, 13 Vt. 330; *Vaughn v. Parr*, 20 Ark. 600; *Shropshire v. Burns*, 46 Ala. 108; *Williams v. Moor*, 11 M. & W. 256; *Fetrow v. Wiseman*, 40 Ind. 148; *Fonda v. Van Horne*, 15 Wend. 631; *Scott v. Buchanan*, 11 Humph. 468; *Cole v. Pennoyer*, 14 Ill. 158; *Cummings v. Powell*, 8 Tex. 80; *Breckenridge v. Ormsby*, 1 J. J. Marsh. 236; *Mustard v. Wohlford's Heirs*, 15 Gratt. 329.

In Massachusetts, where the doctrine was approved that the acts of an infant are void, which not only apparently but necessarily operate to his prejudice (*Oliver v. Houdlet*, 13 Mass. 237), it was afterward said by Chief Justice PARKER, in *Whitney v. Dutch*, 14 Mass. 457: "Perhaps it may be assumed a principle that all simple contracts by infants, which are not founded on an illegal consideration, are strictly not void, but only voidable, and may be made good by ratification. They remain a legal *substratum* for a future assent, until avoided by the infant; and if, instead of avoiding, he confirm them, when he has legal capacity to make a contract, they are, in all respects, like contracts made by adults." And in 1840 (*Reed v. Batchelder*, 1 Metc. 559), Chief Justice SHAW said: "The question, what acts of an infant are voidable and what void is not very definitely settled by the authorities; but, in general, it may be said that the tendency of modern decisions is to consider them as voidable, and thus leave the infant to affirm or disaffirm them when he comes of age, as his own views of his interest may lead him to elect."

So that Mr. Parsons, in his work on Contracts, Vol. I, p. 294,

6th ed., says: "The better opinion, however, as may be gathered from the latter cases, cited in our notes, seems to be that an infant's contracts are, none of them, or nearly none, absolutely void; that is, so far void that he cannot ratify them after he arrives at the age of legal majority."

In 1 *American Leading Cases*, 5th ed., p. 300, it is said: "The numerous decisions which have been had in this country justify the settlement of the following definite rule as one that is subject to no exceptions. The only contract binding on an infant is the implied contract for necessities. The only act which he is under a legal disability to perform is the appointment of an attorney. All other acts and contracts, executed or executory, are voidable or confirmable by him at his election," on arriving at majority. This rule has been quoted and approved in 14 Ill. 158, and 15 Gratt. 329, and we think it embodies the better reason."

In the light of principle, therefore, as well as by the weight of the later authorities, the whole question should be thus resolved: The privilege of infancy is accorded for the protection of the infant from injury, resulting from imposition by others or his own indiscretion. That object is fully accomplished by conferring on him the power to avoid his contracts, or, in other words, by giving him immunity from liability until such contracts are ratified by himself after arriving at full age. And, again, that an adult, laboring under no disability, may perform his unexecuted contracts of infancy, whether they be beneficial or prejudicial to him, and that he will be bound by such performance, we think, is a proposition too plain to be doubted. If, therefore, with full knowledge of the facts, he ratifies and affirms them, being moved thereto by his own sense of right and duty, he should, in law, as in morals, be bound to their performance.

Motion overruled.

Talcott v. Henderson.

TALCOTT V. HENDERSON.

(31 Ohio St. 163.)

Contract — fraud — insolvency as evidence of.

A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay.

But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract if not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact. (*See note, p. 504.*)

MOTION for leave to file a petition in error. The opinion sufficiently states the point.

Hutchins & Campbell, for the motion, cited *Stephenson v. Hart*, 4 Bing. 476; *Irving v. Motly*, 7 id. 543; *Bristol v. Wilmore*, 1 B. & C. 514; *Load v. Green*, 15 M. & W. 216; *Ferguson v. Carrington*, 9 B. & C. 59; *Kilby v. Wilson*, R. & M. 178; *Hawse v. Crowe*, id. 414; *Ford v. Atwater*, 1 Root, 58; *Stewart v. Emerson*, 52 N. H. 301; *Conyers v. Ennis*, 2 Mason, 239; *Powell v. Bradlee & Co.*, 9 G. & J. (Md.) 220; *Johnson v. Monell*, 2 Abb. Dec. 470; *Durell v. Haley*, 1 Pai. 492; *Seligman v. Kalkmun*, 8 Cal. 207; *Bell v. Ellis*, 33 id. 620; *Donaldson v. Farwell*, 93 U. S. 631; *Byrd v. Hall*, 2 Keyes, 647; *Noble v. Adams*, 7 Taunt. 59; *Kilby v. Wilson*, *Ryan & Moody*, 178; *Bristol v. Wilmore*, 1 Barn. & Cres. 514.

Henderson & Klein, contra.

MCLIVAIN, J. The contention of the plaintiff in error is that the failure of DeForrest & Son, at the time of making the purchase, to disclose the fact that their liabilities were largely in excess of the value of their assets, was, in law, such a fraud upon the plaintiff as warranted him in avoiding the contract, and reclaiming the goods.

An intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase, and concealed from the vendor, is, unquestionably, such a fraud as will vitiate the con-

tract. But it is as certainly true, on the other hand, that, where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase.

Whether, therefore, a contract of purchase, where the purchaser fails to disclose his known insolvency, is fraudulent or not, depends on the intention of the purchaser; and whether that intention was to pay or not to pay is a question of fact, and not a question of law.

In the solution of this question, though it be one of fact, it is true, however, that certain presumptions arise, which are entitled to consideration and force. Thus, while it may be said that fraud must be proved, and will not be presumed, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence, if a purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay should be presumed. I would go a step further, and hold that an insolvent purchaser, without reasonable expectations of ability to pay, should be presumed to intend not to pay. Indeed, I would not deny that an intention not to pay might be inferred from the mere fact that the purchaser had undisclosed knowledge of his *gross* insolvency; but, in such case, the inference may be rebutted by other facts and circumstances.

It is claimed that, in good morals, a purchaser, knowing himself to be insolvent, should not accept credit from one ignorant of the fact. Whether this proposition be true or not, it is enough to say that the law, in its practical morality, does not afford a remedy for the violation of every moral duty. While, therefore, a purchase of goods by an insolvent vendee, who conceals his insolvency, with intent to injure the vendor, is fraudulent and voidable, yet a purchase under like circumstances, save only that such intent is absent, is not, in law, fraudulent.

If the rule of law be not as stated, and the intent to injure be not of the essence of the fraud in such case, then it would be wholly immaterial whether the insolvency of the purchaser was known to himself; and the rule would be that all sales to an insolvent purchaser, where the insolvency is unknown to the vendor, are fraudulent and voidable. For such a rule no one would con-

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tend. All would admit that knowledge by the purchaser of his own insolvency is necessary to establish the fraud. But such knowledge, of itself, is entirely innocent. It is only where connected with the concealment of the fact that fraud is shown. The simple failure to disclose a fact, however, is not equivalent to its concealment. The latter implies a purpose—a design; the former does not. If, then, such knowledge on the part of the purchaser be necessary to make out a fraud, it is because it becomes the predicate of an intent—and intent to injure.

True, the decisions of different courts upon this question are not uniform. The discrepancies, however, are not so much on the point whether a fraudulent intent on the part of the purchaser is necessary to avoid the purchase, as to the question of conclusiveness, under the circumstances of each case, of the inference of fraudulent intent, from the facts that the purchaser had knowledge of his insolvency, and failed to disclose it to the vendor. There is no well-considered case, so far as I have examined the authorities, which holds that fraud is conclusively presumed from these facts alone. Where, in addition, it is shown that the appearance and circumstances of the purchaser indicate solvency and wealth, there are cases which hold the inference of fraudulent intent to be conclusive. Of course, we admit that if the appearance of solvency be assumed for the purpose of deceiving, as in 1 Root, 58, the existence of fraud is actually shown; but we think that where such appearance is entirely innocent the question of the existence of fraud is still open to further inquiry.

From these views, how stands the case before us? At the date of the contract, De Forrest & Son were largely insolvent. They had knowledge of the fact, and did not disclose it to the plaintiff, who was ignorant of it. They were also in possession of a large stock of merchandise, and were doing an extensive business. From these facts, it might well be inferred that they intended to obtain the plaintiff's goods without paying for them; at least, that they had no reasonable expectation of being able to pay for them at the maturity of their promise. If the court below had so found, we would not disturb the finding; and, for aught that appears, the court would have so found, if no other fact had appeared in the case.

But there was other testimony, tending to prove that De Forrest & Son did, in fact, intend to pay for the goods, according to the

terms of their agreement, and that, under all the circumstances, they might reasonably have expected to be able to do so. It is quite sure that they could not reasonably have expected to be able, at that time, to pay all their indebtedness; but, in our opinion, it was not essential to the good faith of the transaction, that there should have been reasonable grounds for the latter expectation; it was enough, if they reasonably expected to be able to pay for the goods in question at maturity.

It is quite clear, from the evidence, that the appearances of wealth which surrounded the purchasers were entirely innocent. It may be that the plaintiff was misled by these appearances; but, upon this ground, he cannot complain of fraud. Where an insolvent merchant is engaged in an honest effort to retrieve his fortunes, the appearance of wealth indicated by his stock in trade is not equivalent to a representation of solvency; and one who gives him credit without inquiry, has no right to complain of fraud.

It was the duty of the Court of Common Pleas, discharging the functions of a jury, to weigh all the testimony; and having done so, and found that there was no intent to defraud in the transaction, we, as a reviewing court, cannot say that the District Court erred in not finding that the judgment of the Common Pleas was manifestly against the evidence.

Motion overruled.

NOTE BY THE REPORTER. — While the Pennsylvania cases, *Smith v. Smith*, 31 Penn. St. 367; *Buckentoss v. Speicher*, 31 id. 394, are the other way, the authorities are strongly in favor of the proposition that a purchase made when the purchaser knows he is insolvent, and with the preconceived purpose not to pay, is void, even though there may not have been, at the time of the purchase, any fraudulent representations. *Donaldson v. Farwell*, 98 U. S. 631; *Powell v. Bradlee*, 9 Gill & J. 230; *Ayres v. French*, 41 Conn. 143; *Nichols v. Michael*, 23 N. Y. 264; *Hennequinn v. Naylor*, 24 id. 139; *Devoe v. Brandt*, 53 id. 468; *Wright v. Brown*, 67 id. 1; *Dow v. Sandborn*, 3 Allen, 181; *Ex parte Whittaker*, L. R., 10 Ch. App. 446.

In *Nichols v. Michael*, 23 N. Y. 264, the court charged that "if Plinner was insolvent, and concealed the fact of his insolvency with the design of procuring the goods and not paying for them, it was a fraud which rendered the sale void, if the plaintiff so chose to regard it;" "if the jury find no other fraud in the case than the omission of Plinner to disclose his insolvency, it will not be sufficient to avoid the sale;" "false representations in the case may be sufficient to avoid the sale without being such as would be indictable under the statute against false pretenses." *Held*, correct. The New York cases are not much reasoned on this point.

In *Ayres v. French*, 41 Conn. 143, the court say that it is not always necessary, to constitute fraud, that the party must make a false statement as to some material existing fact, knowing it to be false. If a man purchases goods with a preconceived design not to pay for them, he is guilty of fraud. Citing *Read v. Hutchinson*, 3 Camp. 353; *Noble v. Adams*, 7 Taunt. 59; *Bristol v. Wilmore*, 1 Barn. & Cress. 514; *Kilby v. Wilson*, Ry. & Mood. 178; *Hause v. Crouse*, id. 414; *Ferguson v. Carrington*, 9 Barn. & Cress. 59; *Dow v. Sandborn*, 3 Allen, 181; *Hall v. Naylor*, 13 N. Y. 533.

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In *Dow v. Sanborn*, 3 Allen, 183, the court say: "We can entertain no doubt that when goods are purchased with a preconceived intention not to pay for them, this is a fraud upon the vendor which will entitle him to repudiate the sale. Such is the doctrine of the English authorities; and, although it has been questioned in some recent cases in Pennsylvania and New York, it rests upon sound principles of morality and law. In such a case, the fraudulent party pretends to be a purchaser when he is not, but is, in fact, attempting to obtain possession of the property dishonestly, with a view to deprive him of it without consideration. As far as the buyer is concerned, the whole sale is a mere fiction, a delusion imposed upon the seller to induce him to part with the possession. If it be said that a mere intention does not constitute fraud, the answer is that the purchase with such a fraudulent intention is a fraudulent intention. In its moral quality it is hard to distinguish it from a larceny." Neither in the opinion nor in the citations of counsel is there any warrant for ranking New York with Pennsylvania on this question.

The adjudications on this subject are reviewed in *Stewart v. Emerson*, 53 N. H. 301, where it is held that the intent not to pay and the concealment of that intent, at the time of the purchase, constitute a fraud which will except the debt from a discharge in bankruptcy.

In *Donaldson v. Farnell*, 98 U. S. 681, the question is not discussed, but the court say that the fraudulent concealment of the insolvency and the intent not to pay constitute a fraud sufficient to warrant a disaffirmance of the contract, if no innocent third party has intervened.

Mulliken v. Millar, decided in March last by the Supreme Court of Rhode Island, affords a useful illustration as to what evidence of fraud by a purchaser will be sufficient to enable the vendor to annul the sale. It appeared that Millar, through his agent, purchased certain merchandise on credit, and the day after its delivery made a general assignment to T. for the benefit of creditors. As his liabilities were large and his assets small, the vendor, after demand on T., brought trover for the merchandise. It was held that it was not necessary for the plaintiff to show a particular intent on the part of Millar to defraud in the particular transaction in question. That it was sufficient for the plaintiff to satisfy the jury of a general intent on his part to defraud by continuing to purchase on credit after he had become hopelessly insolvent, and that the intervention of the agent was immaterial. The court said: "It may be that Millar, having become hopelessly insolvent, had made up his mind to go on making purchases as usual, intending not to pay for them, but to accumulate assets for his assignment. If, with such mind and intention, Millar had personally bought the oil, there can be no doubt that the plaintiff would have had the right to disaffirm the sale for fraud and reclaim the property. The transaction would have clearly involved a preconceived design to purchase and not pay, which has been repeatedly decided to be fraudulent; *Benjamin on Sales*, § 440, note; *Stewart v. Emerson*, 53 N. H. 301; *Lugin v. Marie*, 6 Wend. 77; *Ferguson v. Carrington*, 9 B. & C. 59; *Load v. Green*, 15 M. & W. 216. And can it be held that it was any less a fraud for Millar to allow his agent to go on making the purchases, simply because he did not know what particular purchase the agent was going to make; or of what particular person the agent was going to make them, although he knew generally that it was in the usual course of the business for the agent to make such purchases? We think not. The dishonest mind and purpose would exist in both transactions, being merely more direct and specific in the one than in the other, and any definition of fraud which should not include both, would leave a wide margin for the operation of the fraudulent."

On the other hand, in *Smith v. Smith*, 21 Penn. St. 367, the court say: "An intention not to pay is dishonest, but it is not fraudulent. The law provides an action on the contract as the remedy for just such dishonesty. And it is no more fraudulent to have such an intention at the time of the purchase than at the time when payment ought to be made. Such intention by itself is disregarded by the law, for it can be set aside by the usual contract remedies. Nor does insolvency make a sale voidable after delivery. If such were the law, there is no calculating the suspicions and disputes which it would nourish. If it were so the law of stoppage *in transitu* would be effectually abolished by one of a much more sweeping character. Nor does insolvency combined with an intention not to pay, for it is no more fraudulent in an insolvent, than in a perfectly solvent man, to have such an intention. The buyer's knowledge of his insolvency would be quite as dangerous a test of fraud, for it might always be inferred from the fact of insolvency, and from the presumption that

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every man is acquainted with his own affairs. If the fact of buying implies an assertion of solvency, then every contract by a man in falling circumstances can be made fraudulent; for to this implied assertion a jury might add the inference that he had investigated his affairs and knew his insolvency, or had not, and knew his ignorance; and then might follow, just as logically, the inference of intention not to pay. Thus all the elements of fraud contained in the proposition under consideration may be inferred from the mere fact of a subsequent failure, and the contract is avoided for a constructive, rather than an actual fraud."

In *Bell v. Ellis*, 38 Cal. 680, there is a dictum agreeing with *Smith v. Smith*, but the decision is put on another ground.

Excepting, therefore, the Pennsylvania cases, we find the doctrine universal that the combined insolvency and intent not to pay, with the fraudulent concealment of those matters, constitute such fraud as will annul the sale. The cases generally cited to the contrary only hold that the one or the other of these circumstances alone will not have that effect. See remarks of Selden, J., *Nichols v. Michael*, 28 N. Y. 374. The cases are uniform that mere concealment of insolvency will not suffice, and Mr. Parsons thinks the mere concealed intent not to pay will not, because if the purchaser has the ability he may be made to pay. 2 Pars. on Cont. 366, marg.

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(31 Ohio St. 219.)

Criminal law — larceny — taking and concealing property to get reward.

The wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny.

INDICTMENT for larceny. The opinion sufficiently states the point.

C. H. Scribner, for plaintiff in error, cited, as to what is larceny, and how far the intent to convert the thing taken to the use of the taker is an ingredient of it. 2 East's Crim. L. 553, 662; 2 Russell on Crimes (6th ed.), 2, 8; *Hannon's Case*, 2 Leach, 1089; *Reg. v. Halloway*, 2 Car. & K. 945; Wharton's Crim. Law (3d ed.), 640, 646; Roscoe's Crim. Ev. (7th ed.) 621; 2 Arch. Crim. Pr., Waterman's, 361-363, note, 366, 367; 3 Greenl. Ev., §§ 150, 157; 2 Bishop on Crim. Law, §§ 862, 863, 869; *Rex v. Crump*, 1 C. & P. 658; 11 E. C. L. 516; *Rex v. Dickinson*, Russ. & Ryan, 410; *Queen v. Holloway*, 1 Den. C. C. 370; *Rex v. Phillips & Strong*, 2 East's Pl. Cr., ch. 16, § 98; *Rex v. Webb*, 1 Moo. C. C. 431; *Rex v. M'Makin*, Russ. & Ry. 333 n; *Reg. v. York*, 1 Den. C. C. 335; *Reg. v. Gardner*, 9 Cox's C. C. 253; *Reg. v. Poole*, Dears. & B. C. C. 345; *Reg. v. Wright*, Old Bailey, 1828; Cor. C. L. 278, 279; *Reg. v. Guernsey*,

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1 Post. & Fin. 394 ; *State v. South*, 4 Dutch. 28 ; *McDaniel v. The State*, 8 Sm. & M. 401 ; *Witt v. State*, 9 Mo. 672 ; *State v. Hawkins*, 8 Port. 461 ; *State v. Bonwell*, 2 Harring. 529 ; *State v. York*, 5 id. 493 ; *State v. Self*, 1 Bay. 242 ; *U. S. v. Durkee*, 1 McAl. 196 ; *Reg. v. Cabbage*, R. & R. 292 ; *Rex v. Morfit*, id. 307 ; *Hamilton v. State*, 35 Miss. 214 ; *Dignowitty v. State*, 17 Tex. 521 ; *State v. Brown*, 3 Strobb. (S. C. L.) 508 ; *People v. Juarez*, 28 Cal. 380 ; Arch. Crim. Prac. 375, 376, 391 ; *Alexander v. The State*, 12 Tex. 540 ; *Commonwealth v. Mason*, 105 Mass. 163 ; *Rex v. Phillips*, 2 East's P. C. 662 ; *Rex v. Dickinson*, Russ. & Ry. 420 ; *Reg. v. Hall*, 1 Denn. 381 ; *Reg. v. Manning*, 14 Eng. Law & Eq. 548 ; *Reg. v. O'Donnell*, Cox's C. C. 337.

BOYNTON, J. [Omitting preliminary questions.] That the two geldings were wrongfully taken from the owner, without his consent, concealed and secreted in the woods some three miles distant, for the purpose of securing a reward which the parties to the transaction expected would be offered for their return ; and that the result contemplated was accomplished by their return and a receipt of the reward, in the meantime offered, are facts clearly proved. They are almost a necessary result of the verdict. The claim of the plaintiff in error was, and his position now is, not that such taking with such intent was not shown, but that such taking with such intent was not larceny or horse stealing, under the statute. If mistaken in this, if the intent thus disclosed in connection with the acts committed constitutes, in law, the crime of larceny, it is entirely immaterial whether the instructions of the court as to the legal effect of certain established facts upon the question of intent were correct or not. This leads us to inquire into the correctness of the instructions given, and those requested and refused, in view of the facts developed at the trial. The statute declares, "that if any person shall steal any . . . gelding . . . of any value, . . . every person so offending shall be deemed guilty of a misdemeanor. Having no statutory definition of the word "steal," we must gather its import and meaning from the common law.

The substantial difference between the instruction given to the jury, and the one requested and refused, may be stated in a few words. The court held, in effect, and so advised the jury, that if the geldings were wrongfully taken without the consent of the

owner, with intent to conceal and secrete them, until a reward was offered for their return, and for the purpose of obtaining such reward, such taking was larceny. The request refused embodied the converse of this proposition. We think the instruction was right. It is not easy to reconcile the various definitions of larceny given by text writers, and the authorities. See 2 Bish. Cr. L., § 758, note. In 2 East's Crown Law, 553, it is defined to be, "the wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." Mr. Baron PARKE, in commenting on this definition, held it incomplete in not defining the meaning of the term "felonious," and declared the taking must be, not only wrongful and fraudulent, but also "without color of right," and that "there must be an intention to deprive the owner wholly of his property." *Regina v. Holloway*, 1 Den. C. C. 370.

The contention of the plaintiff is that the facts established at the trial did not bring the case within the rule thus stated, inasmuch as there was no intention to deprive the owner wholly or permanently of his property. In an exact sense, it is not true that an intent to appropriate permanently the property taken is a necessary ingredient in the crime of larceny, if by permanent appropriation is meant keeping the specific property from the possession of the owner. If A wrongfully takes from B, without his consent, a bushel of wheat, and returns and sells it to B, no one will contend that the fact that the wheat was thus returned, and intended to be so returned when taken, relieves the act of taking of its felonious character. In such case, the offense of larceny would be as complete as if the wheat had been sold to a stranger. So, if the geldings taken in the case at bar had been disguised, returned and sold to the owner in pursuance of a purpose formed when they were taken, that the transaction would have constituted larceny cannot be doubted. Yet, in respect to the fraudulent character of the transaction, or in point of moral obliquity, it would be difficult to distinguish it from the case here made. The only possible difference in the two cases is, that in the one there would be an intent to convert the whole value of the property, and in the other only a part. But in this case there was an utter absence of intention to restore the property unless money was paid for its restoration. There was

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no evidence tending to show a purpose to return the property unless a reward was offered therefor. A return, at all events, was not designed. It is true that all parties concerned in the taking contemplated and expected that the owner would offer such reward; but the purpose to return was founded wholly on the contingency that a reward would be offered, and unless the contingency happened the conversion was complete. Whether an intent to return at some remote period of time, in case no reward was offered, would have reduced the transaction to a lesser offense, we have not considered. See note to *Reg. v. Holloway*, above cited. In *Regina v. Spurgeon*, 2 Cox's C. C. 102, where property was temporarily deposited by the owner in a public room, and was taken away by the prisoner for the purpose of exacting a reward for its restoration, the jury being of the opinion that he would not have restored it without such reward, it was held to be larceny.

In *Reg. v. O'Donnell*, 7 Cox's C. C. 337, it was held that if property be taken with the intention of holding it until the rightful owner should pay a certain sum, and obliging such payment, the offense of larceny was complete.

In *The Queen v. Hall*, 5 British Crown Cases, 389, the prisoner took a quantity of fat from A, removed it to another room, and in a short time offered to sell it to A as the fat of one Robinson, a butcher. It was held that he was guilty of larceny. *Regina v. Manning*, 1 Dearsly's C. C. 21, is to the same effect. See, also, *Regina v. Gardner*, 9 Cox's C. C. 253.

In *Regina v. Peters*, 1 Car. & Kir. 245, it was held, "that if a person drop a chattel, and another find it and take it away with intention to appropriate it to his own use, and only restores it because a reward is offered, he is guilty of larceny.

In *Commonwealth v. Mason*, 105 Mass. 163; 7 Am. Rep. 507, it was held, that taking a horse while trespassing upon the taker's premises, with intent to conceal it until the owner should offer a reward for its return, and then to return it and claim the reward, or with intent to induce the owner to sell it astray for less than its value, is larceny. MORTON, J., said: "We think that when a person takes property of another, with the intent to deprive the owner of a portion of the property taken, or of its value, such intent is felonious and the taking is larceny." And again: "The jury must have found, under the instruction given them, that the defendant took the horse with intent to conceal and retain it until

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he could obtain a reward from the owner, or until he could effect a purchase from him at a price less than its real value. The intent in either contingency was to deprive the owner of, and appropriate to his own use, a portion of the value of the property. We are of opinion that upon principle, and the weight of the authorities, the taking with such intent was larceny."

Mr. Bishop, in 2 Crim. Law, § 841 (a), says: "The doctrine seems to be both in principle and authority, that if the intent is not to deprive the owner of the whole thing but of a part of it, or a part interest in it, the transaction will be larceny." See, also, 2 Whart. Crim. Law, § 1781 *et seq.*

Regina v. Holloway, so much relied on by plaintiff's counsel, was this. The prisoner was indicted for stealing some dressed skins of leather. A special verdict was returned showing that "the prisoner took the skins, not with the intent to sell or dispose of them, but to bring them in and charge them as his own work and to get paid by his master for them." The skins had been dressed by another workman and not by the prisoner. It was held not to be larceny.

In the case of *Regina v. Poole*, 1 Dears. & Bell's C. C. 347, similar in principle to *Regina v. Holloway*, COMPTON, J., referring to the latter case, said: "I confess I am not so clear as to the principle of that decision. If this had been the first time the point had been raised, I should have been inclined to think that there was sufficient here to make out the *lucri causa*." Whether this criticism is just or not, that case is clearly distinguishable from the present.

[Omitting unimportant questions.]

Judgment affirmed.

BEREA STONE COMPANY V. KRAFT.

(31 Ohio St. 287.)

Master and servant — negligence — superior servant.

The master is liable for an injury to a servant resulting from the negligence of a superior servant, while the latter is discharging the duties of one under his control, to the same extent as if the act causing the injury had been committed by an inferior servant under his directions.*

* See *Malone v. Hathaway* (84 N. Y. 5), 21 Am. Rep. 573 and note, 579; *Brothers v. Carter* (52 Mo. 873), 14 Am. Rep. 424; *Mullan v. Phila., etc., Steamship Co.* (78 Penn. St. 25), 21 Am. Rep. 2 and note, 7.

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MOTION for leave to file a petition in error. Action of negligence, for injuries to plaintiff's person while in the defendant's employment and engaged in loading stone upon its cars, through the negligence of the agents and servants of the company "in the selection, use and employment of unsafe, insecure and dangerous implements and machinery for the purpose of loading the said stone upon cars for transportation, and . . . allowing to drop a large stone, of about three thousand pounds weight, upon the plaintiff's foot, whereby he became permanently injured." Verdict for the plaintiff. The company was engaged in loading stone from the quarry on cars, under the direction and superintendence of Orville Stone, its agent, who was foreman of the quarry; the company employed for such purpose a derrick, wire rope, chains, and hooks; the chains for hoisting soft stone, the hooks for raising hard stone; the latter were unsafe and dangerous when used to hoist soft stone, of which fact Stone and the company had knowledge. The plaintiff below and another laborer were engaged in loading the stone, the plaintiff being on the car some twenty-five or thirty feet above the stone. While such co-laborer was temporarily absent, Stone, the foreman, who had directed the use of the hooks instead of the chains, fastened the same, with the assistance of a workman, to a soft stone, to be elevated to the car by means of the derrick. As the stone reached and swung over the car, the plaintiff took hold of it to steady it, when the hooks gave way where they were fastened to the stone, breaking out a part of the same, and the stone fell, inflicting the injury. The defendant below asked the court to instruct the jury as follows: 1. "That a corporation is liable to an employee for negligence or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance." 2. "That, if the injury happened" (was caused) "by the negligence of the defendant's foreman, when he was doing the work of a co-laborer with the plaintiff, and not when in the discharge of his duties as foreman and representative of the defendant, the plaintiff cannot recover, unless the plaintiff shows that the defendant did not exercise reasonable care and prudence in the selection of a foreman."

The court refused to give either of these requests, and the defendant excepted. The judgment was affirmed.

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E. Sowers, with whom was *J. E. Ingersoll*, for the motion, cited *Flike v. Railroad*, 53 N. Y. 549; 13 Am. Rep. 545; *Harper v. Railroad*, 47 Mo. 567; 4 Am. Rep. 353; *Brickner v. Railroad*, 2 Lans. 506; *Ford v. Railroad*, 110 Mass. 240; 14 Am. Rep. 598; *Corcoran v. Holbrook*, 59 N. Y. 517; 17 Am. Rep. 369.

A. Slutz, with whom was *W. T. Buckner*, *contra*.

BOYNTON, J. The errors assigned for which a reversal of the judgment is sought, are the refusal of the court to give to the jury the instructions requested, and the order overruling the motion for a new trial. That a corporation is liable to an employee for negligence, or want of proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank of the agent intrusted with their performance, may, as a matter of law, be very clear. But the proposition has no application to the case. It is true that the negligence charged as the cause of the injury, consisted in the selection, use, and employment of unsafe, insecure, and dangerous implements and machinery for the purpose of loading stone upon cars for transportation. But upon the trial, no question was made or doubt raised, of the fact that the company had supplied suitable and proper machinery and implements for loading stone, both hard and soft; but its liability was asserted on the ground of its negligent and careless use or employment of machinery and apparatus for hoisting stone, safe and suitable for the especial purpose or use for which such machinery was designed, but unsafe and dangerous for the use to which it was applied. The request obviously had reference to the duty of a master to furnish, so far as the exercise of due care will accomplish it, suitable and safe instrumentalities for carrying forward his work, and these having, admittedly, been furnished, and the request having no other bearing, it was properly refused.

The second request was evidently founded on a misconception of the negligent act which gave rise to the company's liability. It was founded on the hypothesis that the want of care charged, and resulting in the injury to the defendant in error, consisted in the negligent or careless attachment of the hooks to the stone to be raised; hence it was contended that when Stone, the foreman, assisted in attaching or fastening the hooks to the stone, he was performing, not the duty of foreman, but the work of a common laborer, for the

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negligent performance of which the company was not liable. This was clearly a misapprehension of the ground upon which the liability of the company was asserted. The petition, as above stated, alleged negligence in the selection, use, and employment of unsafe, insecure, and dangerous implements and machinery. This was the full scope of the averment. No act of negligence was charged, and no liability claimed to exist, except such as originated in, and grew out of the selection, use, and employment of such implements and machinery for loading stone. The mode or manner of attaching or fastening the hooks to the stone was not the subject of complaint, nor set up as a ground for the recovery of the damages claimed.

But if this construction is too limited, if the liberality with which pleadings under the Code are to be construed, would require us to hold that the language of the petition charging negligence in the "use of unsafe and dangerous implements," is sufficiently broad and comprehensive to include the act and mode of attaching the hooks to the stone, and is not to be confined and restricted to the sense that the hooks, being unsuitable for such service, were misapplied to an improper use, we still think the court did not err, as the proposition embraced in the request is not correct as a rule of law. Where the master, or one placed by him in charge of men engaged in his service, personally assists or interferes in the labor being performed under his direction and control, and is, while performing such labor, or interfering with its performance, guilty of negligence resulting in an injury to one engaged in such service, there is no sound principle of law that will excuse or exonerate the master from liability. *Ormond v. Holland*, 96 Eng. Com. Law, 102; *Shearm. & Redf. on Neg.*, § 89 *et seq.*; *Wharton on Neg.*, § 205.

The ground of the liability of the master for the negligent conduct of his servant, in all cases where the liability arises, is, that the servant's act is the act of the master. The implied obligation of the servant to assume all risks incident to the employment, including that of injury occasioned by the negligence of a fellow-servant, has no application where the servant, by whose negligent conduct or act the injury is inflicted, sustains the relation of superior in authority to the one receiving the injury. The claim that Stone was a fellow-servant engaged in the same service with Kraft is not supported by the proof. It is true that he was in the

service of the same master, and engaged in the same general employment, but he was intrusted with duties and responsibilities of entirely a different nature, and wholly independent of those of Kraft. Occupying to the latter the relation, substantially, of principal, he was in no just or proper sense a fellow-servant, nor engaged in what may properly be denominated a common service. The relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this court, and now firmly settled in the jurisprudence of the State, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury. *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *C. & C. R. R. Co. v. Keary*, 3 Ohio St. 201; *Mad River and Lake Erie R. R. Co. v. Barber*, 5 id. 541; *Whaalan v. Mad River and Lake Erie R. R. Co.*, 8 id. 249; *The Pittsburgh, Fort Wayne and Chicago Railway Co. v. Devinney*, 17 id. 197.

The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised, may have caused the injury, and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in nowise relieves the company from liability. If the act done by him had been done under his direction as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason, that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person.

[Omitting question of evidence.]

Motion overruled.

DAVIS V. JUSTICE.

(31 Ohio St. 359.)

Civil damage act — death of intoxicated person.

In an action under the civil damage act for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death cannot be recovered.* (See note, p. 518.)

* See, also, *Shugart v. Egan* (33 Ill. 56), 36 Am. Rep. 359, and note.

ACTION for injury to wife's means of support by causing death of her husband by intoxication.

W. W. Johnson, with whom was *John Hamilton*, for plaintiff in error.

A. F. Cole, for defendant in error, cited *Ford v. Monroe*, 20 Wend. 210 ; *Sullivan v. Railroad*, 1 Cent. L. J. 595.

MOLLVAINE, J. The principal question in this case is, whether the means of support of a wife who was dependent upon her husband's labor is, within the meaning of the statute, injured by the death of the husband caused by intoxication ?

The statute reads as follows : " Section 7. That every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer, or other person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons; and the owner of, lessee, or person or persons renting or leasing any building or premises, having knowledge that intoxicating liquors are to be sold therein in violation of law, or having leased the same for other purposes, shall knowingly permit intoxicating liquors to be sold in such building or premises, that have caused the intoxication, in whole or in part, of such person or persons, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, as well as exemplary damages ; and a married woman shall have the same right to bring suits and control the same, and the amount recovered, the same as a *feme sole*."

By the common law, it is clearly settled that actions for personal injuries abate by death, and cannot be revived or maintained by the executor or by the heir. And if the law does not afford a remedy to the creditor or the heir, for a pecuniary injury resulting from death, it is difficult to perceive a reason why a remedy should be allowed to one sustaining any other relation to the deceased.

In *Baker v. Bolton*, 1 Campb. 493 — an action for injuries to the

plaintiff and his wife from which she had died — Lord ELLENBOROUGH said: "The jury could only take into consideration the bruises which the plaintiff himself had sustained, and the loss of his wife's society and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution. In a civil court, the death of a human being could not be complained of as an injury; and in this case the damages as to the plaintiff's wife must stop with the period of her existence."

In support of the doctrine thus laid down by this eminent common-law jurist, it may be said that previous thereto, the books of the common law show no instance in which such damages were claimed, and this decision remained unquestioned in England until the year 1873, when the doctrine was re-affirmed in *Osborne v. Gillet*, 8 L. R. Exch. Cases, 88, which was an action by a master for an injury which caused the death of his servant.

In this country, the question has been brought more frequently before the courts, and although the decisions have not been entirely uniform, unquestionably, both in number and authority, they sustain the doctrine of *Baker v. Bolton*. The latest case, in which the authorities are reviewed, is *Mobile Life Ins. Co. v. Brame*, decided by the Supreme Court of the United States, on the 21st of January, 1878, and reported in 95 U. S. 754, in which HUNT, J., uses the following language: "The authorities are so numerous and so uniform to the proposition, that by the common law no civil action lies for an injury resulting in death, that it is impossible to speak of it as a proposition open to question."

In this State, the point has not been adjudicated; but we think the doctrine has been recognized by the legislature in the enactment of March 28, 1851 (49 Ohio L. 117), entitled "an act requiring compensation for causing death by wrongful act, neglect, or default," by which, under certain conditions and limitations, an action is given to the personal representative for the benefit of the widow and next of kin of the deceased. Before the passage of this statute, an action for pecuniary loss, resulting from the death of a human being, was unknown in our practice, and ever since, the only suits for such loss have been prosecuted under its provision. This statute has always been regarded as an innovation upon the principles of the common law, and as affording the only civil remedy for an injury caused by death.

The seventh section of the liquor act, above quoted, was also an

innovation upon the common law ; as, before its enactment, there was no action for an injury caused by an intoxicated person, or in consequence of the intoxication, against the person who caused the intoxication. But since the action is thus given by the statute, the question is, whether, in view of the state of the law as it existed at the date of its passage, the terms of the section should be so construed as to extend the remedy to damages resulting from the death of the person intoxicated.

Injuries "by any intoxicated person, or in consequence of the intoxication," are the terms of the statute; and it is contended that if intoxication causes death, and death causes injury, the latter is within the meaning of the act. On the other hand, it is contended, that as the legislature must be presumed to have known the state of the common law, and the extent of the innovation by the act of 1851, if a further innovation had been intended, such intention would have been expressed in unmistakable terms. We incline to the latter view.

Indeed, where the injury to be compensated consists in the loss of labor, it is at least paradoxical to say that labor which could not be performed during the life of a laborer is included. And, again, in construing the words of the statute applicable to the case before us, it might be said that the action can be maintained only for an injury to means of support of the plaintiff, *as wife* of the person intoxicated, and not for an injury sustained by her as his widow. She had an interest in his labor and in his capacity to labor, as a means of support, during his life ; but after his death this means of support no longer existed, and was not the subject of injury or diminution.

But to avoid any charge of hypercriticism, we place our decision upon the ground that in view of the previous state of the law, and the mischief sought to be remedied, we can find no expression in the statute that indicates an intention on the part of the legislature to bring the loss of labor caused by the death of the person intoxicated within the meaning of the term "means of support," for an injury to which the right of action is given by the statute.

The uncertainty, if not impossibility, of estimating the value of human life, or in other words, the pecuniary injury resulting from its destruction, undoubtedly was a reason why the common law gave no remedy. Hence, in every instance in which a remedy has been given by the statute, great care has been exercised in guard-

ing against abuse. Our own statute of 1851, like those of other States where the common law is recognized, imposes restrictions on the right to sue, limits the amount of recovery, designates the party in whose name the action must be prosecuted, and directs the disposition of the amount recovered among the intended beneficiaries. These conditions and limitations are not only manifestations of legislative wisdom, but would seem to be demanded by common prudence; whereas, in the statute before us, these wise and prudent precautions are wholly wanting. Under it a multiplicity of actions for the same wrong is authorized, and the amount of recovery is unlimited. When the terms of the statute under consideration are considered in the light of these circumstances, we are fully satisfied that the legislature did not intend to give the plaintiff below an action for an injury resulting from the death of her husband.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—In view of the comparative novelty of the statute and the importance of the question, we give below the dissenting opinion of BORNSTON, J.:

BORNSTON, J. I dissent from the judgment of the court. The construction given to the statute, in my judgment, violates both its letter and its spirit. It violates its letter in disregarding the plain meaning of the language which declares that in all actions brought under its provisions, the offending party shall be liable "for all damages sustained, as well as exemplary damages." That it violates its spirit is clearly manifest from an examination of its various provisions, and their consideration in the light of the evils sought to be avoided by their enactment.

By section 6, S. & C. 1432, it is provided that every person, who, by the illegal sale of intoxicating liquor, shall cause the intoxication of any other person, such person shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and one dollar a day in addition thereto; and this liability covers the period the person intoxicated is kept in consequence of such intoxication.

By section 7, as amended in 1870 (67 Ohio L. 102), the civil liability attaches where the liquor unlawfully sold causes the intoxication only in part.

By section 10, amended by the same act, the exemptions of property from levy and sale, both real and personal, provided for by the "act to exempt the homestead of families from forced sale on execution to pay debts" (S. & C. 1145; 66 Ohio L. 48; 66 Id. 106), are expressly withheld and disallowed, and all the estate of the debtor, except a few specified articles of personalty, is liable for the payment of the judgment. Neither a homestead nor any property in lieu thereof is exempt from levy or sale to satisfy any judgment rendered under the statute.

These provisions clearly indicate a purpose on the part of the legislature to require the seller, and the owner of the premises when liable, to make full and adequate compensation in damages, to the party injured through their violation of the statute. In full accord with this purpose, and to carry the same into effect, this court held in *Schneider v. Hostler*, 21 Ohio St. 98, that in all actions under said section (7), in which the plaintiff shows a right to recover damages actually sustained, the jury may also assess exemplary damages without proof of actual malice or other special circumstances of aggravation.

This holding was soon followed by *Mulford v. Clewell*, id. 191, in which it was held that "means of support relate to the future as well as to the present. It is enough if she (the

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wife) show that the sources of her future support have been cut off, or diminished below what is reasonable and competent for a person in her station in life. * * * * The health of the husband and his ability to labor are often, to a greater or less extent, the means of the wife's support. In many cases to destroy these is to destroy her means of support. To take away the husband's power to accumulate means of future support for his wife is, within the meaning of the law, to injure her in her means of support."

It is now said, in the face of these provisions and of this ruling, and notwithstanding the emphatic language of the statute that makes the seller liable for all damages sustained through his wrongful act, that inasmuch as the husband lost his life in consequence of the intoxication no recovery can be had. The very flagrancy of the seller's act, judged by the light of the consequences that resulted from it, is made to shield him from liability. The argument in support of this position is founded on the assumption that, had the legislature intended a liability to arise where the unlawful sale resulted in death it would have expressed such intention in terms more unmistakable than those employed; and on the further assumption that the act of March 25, 1851 (S. & C. 1130), giving a right of action where death has resulted from the wrongful act, neglect, or default of another, affords, and was intended to afford, the only remedy provided for all cases where death ensues. The answer to these positions is decisive against their validity.

It is a rule of interpretation universally accepted that in giving a construction to a statute the court will consider its policy and the mischief to be remedied, and give it such an interpretation as appears best calculated to advance its object by effectuating the design of the legislature. *Wilber v. Paine*, 1 Ohio, 255. It is equally well settled that where the legislature has employed explicit and unambiguous terms to express its purpose and object, the ordinary meaning of such terms is to be adopted. *Gardner v. Collins*, 2 Pet. 98.

In *Brover v. Hunt*, 18 Ohio St. 341, it was said, adopting the language of *Stow, J.*, in *Gardner v. Collins*, that, "what the legislative intention was can be derived only from the words they have used, and we cannot speculate beyond the reasonable import of their words. The spirit of the act must be extracted from the words of the act, and not from conjectures, *altunde*."

It is not doubted that cases frequently arise where, to give effect to the manifest intention of the legislature, it becomes the duty of the court to modify, restrict, or enlarge the common or ordinary meaning of the language employed. This duty arises when it is made to appear that, to give effect to the ordinary meaning of the language used, will not carry into operation the legislative will. But a departure from the rule requiring an adherence to the ordinary signification to the terms employed can only be justified where it becomes necessary to restrain or enlarge such meaning in order to carry out the manifest design of the statute.

"Where the intention of the legislature is doubtful, the literal and obvious interpretation of the terms of the statute ought to be adhered to." *Burgett's Adm'rs v. Burgett*, 1 Ohio, 469. In *Corwin's Lessee v. Benham*, 2 Ohio St. 43, it was said by *RANKIN, J.*, "that the usual import of words is sometimes to be restricted, where it would otherwise extend beyond the subject-matter and spirit of the whole enactment. But this cannot be done because the legislature did not foresee or contemplate every case upon which it might operate. The wisest legislators would fall far short of such foresight. If within the language, it must appear clearly to the court that the case would have been excluded if foreseen." And in *Woodbury v. Berry*, 18 Ohio St. 456, in language equally clear and emphatic, it is declared that, "where the words of a statute are plain, explicit, and unequivocal, a court is not warranted in departing from their obvious meaning, although from considerations arising from language outside of the statute it may be convinced that the legislature intended to enact something different from what it did enact." In the present case, the right of Mrs. Justice to recover all damages she sustained by the wrongful act of the plaintiff in error, whether such act caused the death of her husband or not, is not only clearly given by the language employed, but such language, in its ordinary meaning, is clearly expressive of the design of the legislature, and is in complete and perfect harmony with the spirit and policy of the statute.

The correctness of this interpretation is not at all affected by the act of 1851. That act affords no relief, and was intended to furnish none in this class of actions. To have

amended that act, so as to embrace actions of this kind, would have been an innovation upon its policy, and a departure from the principles upon which it is founded. It is indispensable to the right to recover under that act, that the deceased himself should have been free from fault contributing to his injury. The act, neglect, or default must have been such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. S. & C. 1140. A moment's reflection will satisfy the mind that no recovery could be had in such case for an injury resulting from an illegal sale of intoxicating liquor.

A person injured while in a state of intoxication voluntarily assumed will not be permitted in a court of justice to recover damages for an injury that his own voluntary act brought upon him. And where he could not recover, no liability arises. There is, therefore, no foundation for the argument, that, if a recovery could be had under the act of 1854, as amended in 1870, there would be two statutory rights of action for the same cause.

But even if this were so, it would not justify the conclusion claimed. The 7th section of the act of 1854, as amended in 1870, gives several rights of action for the same cause. The wife and each child, if severally injured in their person, property, or means of support, by the intoxication caused by the seller, may maintain several actions for the same unlawful act. If a person while intoxicated injures fifty men, each of them may maintain an action against the person whose unlawful sale of liquor caused the intoxication. In such case the statute makes the seller a joint wrong-doer, as much so as if he were present aiding and abetting the unlawful act of the person intoxicated.

The argument of counsel for the plaintiff and the judgment of the court seem to be founded on the mistaken notion that the action is brought to recover damages for the death of the husband. Such is not the case. The wrongful act which constitutes the ground of the action is the illegal sale of the liquor causing the intoxication from which the injury results. The death of the husband only affects the measure of damages. It destroys his ability to labor, and thereby diminishes the wife's means of support. If the husband had lost both his arms or legs, or become permanently insane, in consequence of the intoxication, or had otherwise become permanently disabled to perform physical labor, and had survived, the result to the wife would have been precisely the same. Her injury, in either case, would consist in the deprivation of the means of support resulting from the loss of her husband's ability to labor. There is not the slightest foundation in reason or justice for an intention upon the part of the legislature to authorize a recovery for an illegal sale causing intoxication resulting in injury, where death does not follow, and to refuse damages where death results. Indeed, there is much more reason to award damages for the injury in the latter case than in the former. That the legislature intended to authorize a recovery in the one case and not in the other is an assumption not only not warranted by, but in clear contravention of the express provisions of the statute. The argument that the wife has lost nothing, because a dead man cannot labor, proves nothing. Neither can a man labor that has lost his limbs. Moreover, it would be strange, indeed, if he whose unlawful act caused the death of another, could urge the fact in defense, that the circumstance of death destroyed all ability to labor, and consequently operated to exempt him from a liability otherwise existing.

The reason that, at common law, no recovery could be had for death caused by a wrongful act, did not, as stated, grow out of any difficulty in ascertaining the amount that ought to be recovered. It rested upon the ground that the act producing death was a felony which merged the civil liability. That this was the reason why the common law recognized no liability where death thus resulted, is clearly shown by the authorities. *Houk v. Minnick*, 19 Ohio St. 462; *Boston and Worcester Ry. v. Dana*, 1 Gray, 96; *Higgins v. Butcher*, 19 Vt. 89; *White v. Spettigue*, 13 M. & W. 606; 1 Chitty's Cr. 5; 12 East, 418.

This reason does not prevail with us, nor in many, if any, of the American States. But it matters little one way or the other, what the common-law rule may be, or upon what foundation it rests, the statute under which the action below was brought declares the party injured entitled to all damages sustained, as well as exemplary, which result from the illegal act of the seller, and very clearly, in my judgment, embraces all those that follow from the intoxication, whether death supervenes or not. The judgment ought to be affirmed.

Simmons v. The Cincinnati Savings Society.

SIMMONS v. THE CINCINNATI SAVINGS SOCIETY.

(81 Ohio St. 487.)

Gift — check — assignment of bond — revocation.

The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn. *Held*, that until the check was either paid or accepted, the gift was incomplete; and that in the absence of such payment or acceptance, the death of the drawer operated, as against the payee, as a revocation of the check.*

MOTION for leave to file a petition in error. Action on check. Rhoda Wylie, the mother of the plaintiff, was living with the plaintiff, and while lying sick she signed and delivered to the plaintiff her check on defendant as a gift. Mrs. Wylie died before the check was presented. Before it was presented, and before the defendant knew it had been given to the plaintiff, a brother of the plaintiff was appointed administrator of the deceased, and notified the defendant of his appointment, and directed it not to pay the check. Two days afterward, the plaintiff presented the check, and demanded payment, which was refused on the ground of the drawer's decease, and of the direction from the administrator not to pay the check. The money was afterward paid to the administrator, and the plaintiff then instituted this suit.

The court in its charge told the jury that if the check was a gift to the plaintiff, and without consideration, it would be proper for them to take into consideration, in making up their verdict, whether the administrator, by notifying the defendant not to pay the check, did not revoke the gift; that if the check was a gift, the maker had the right to revoke it at any time before the subject of the gift had passed into the actual possession of the plaintiff, and that the administrator had the same right.

The defendant had judgment.

On error, this judgment was affirmed in General Term; and the object of the present proceeding is to obtain the reversal of these judgments.

* See *Shеды v. Roach* (124 Mass. 473), 26 Am. Rep. 680, and note, 684.

Milton Sater, for the motion. A check drawn on a fund in a bank is an absolute transfer or appropriation of the amount named in the check to the holder, and becomes binding on the bank as soon as the bank is notified, provided the bank have sufficient funds of the drawer on deposit to pay it. *McGregor v. Loomis*, 1 Dis. 247; *Morrison v. Bailey*, 5 Ohio St. 18; *Andrew v. Blachly*, 11 id. 94; *Stewart v. Smith*, 17 id. 82; *Dodge v. Bank*, 20 id. 246-7; *Munn v. Burch*, 25 Ill. 35; *Insurance Co. v. Stanford*, 28 id. 172; *Bickford v. Bank*, 42 id. 238; *Brown v. Leckie*, 43 id. 497; *Brown v. Lusk*, 4 Yerg. 210; *Van Bibber v. Bank*, 14 La. Ann. 481; *In re Brown*, 2 Story, 513; 2 Daniel on Neg. Paper, §§ 1572, 1638.

It makes no difference if the drawer dies before the check is presented for payment. *McGregor v. Loomis*, 1 Dis. 247; *Roberts v. Corbin*, 26 Iowa, 315; *Lester v. Given*, 8 Bush, 357; *Buckner v. Sayre*, 18 B. Monr. 745; Daniel on Neg. Paper, § 1643.

As for what is an appropriation of a fund, see *Hoyt v. Story*, 3 Barb. 264.

An appropriation is all that is necessary to transfer the possession of a fund, and any order, writing, or act which makes an appropriation is sufficient. Story's Eq. Jur., § 1047; Adams' Eq., § 54, note a; Smith's Manual of Eq. 244, 245; *Morton v. Naylor*, 1 Hill, 583; *Clemson v. Davidson*, 5 Binn. 392; *Newby v. Hill*, 2 Metc. (Ky.) 530; *Chowne v. Baylis*, 31 Beav. 351.

The administrator of the donor would not have the right to revoke her gift. *Stone v. Hackett*, 12 Gray, 227; Adams' Eq., § 98.

Goodman & Storer, contra.

WHITE, C. J. We find no error in this case to the prejudice of the plaintiff.

The question as to what are the rights of the holder of a check for value, against the drawee or drawer, does not arise in this case. Many of the authorities cited by counsel for the plaintiff relate to this question and need not here be considered.

The plaintiff claims as the payee of a check delivered to her by the drawer, who intended thereby to transfer to the plaintiff, by way of gift, the fund on which the check was drawn; and the question is whether before the payment or acceptance of the check by the drawee, the gift was executed.

It seems clear to us that until the check was either paid or

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accepted the gift was incomplete; and that in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check.

It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the gift, either actual or constructive.

The check in the present instance was a mere order or authority to the payee to draw the money; and being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee.

This conclusion is fully supported by authority. *Hewitt v. Kaye*, L. R., 6 Eq. C. 198; *The Second National Bank of Detroit v. Williams*, 13 Mich. 282; 1 Para. on Cont. *235, *236; Byles on Bills (6th Am. ed. by Sherwood), *25.

Leave refused.

RUSH V. WICK.

(31 Ohio St. 521.)

Infancy — breach of promise of marriage.

Infancy, when pleaded, is a valid defense to an action for the breach of a marriage promise.

MOTION for leave to file a petition in error. Action for breach of a marriage promise. The defense was, that at the time the promise was made defendant was an infant. Judgment for defendant on demurrer.

H. T. Van Fleet, for the motion.

W. Z. Davis, contra.

BY THE COURT. The demurrer was rightfully overruled. A contract to marry, made by an infant, stands upon the same footing as respects his right to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule, that the contract of an infant is voidable at his election. The fact that under the statute (67 Ohio L. 6) an infant may be joined in marriage at the age of eighteen, if a male, and

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sixteen, if a female, having first obtained the assent of the father, or, in case of his death or incapacity, of the mother or guardian, does not affect the right to refuse to perform the contract.

The right to avoid or disaffirm the contract of an infant grows out of his supposed incapacity to protect himself from improvident bargains and relations. And there can be no case where the right to avoid or disaffirm is of more vital concern to his future welfare than where he has made an improvident marriage engagement. The infant's right to avoid such engagement or contract is affirmed by the following authorities. *Holt v. Ward*, 2 Str. 937; *Cannon v. Alsbury*, 1 A. K. Marsh. 76; *Hunt v. Peake*, 5 Cow. 475; *Willard v. Stone*, 7 id. 22; *Warwick v. Cooper*, 5 Sneed, 659; *Pool v. Pratt*, 1 Chip. (Vt.) 252; Bac. Abr., title Infancy and Age, 135; 1 Chitty on Cont. 222; Schouler's Dom. Rel. 535; Macpherson on Infants, 121.

Leave refused.

FINNEY V. SMITH.

(31 Ohio St. 529.)

Libel — damages — counsel fees.

In an action for libel, the jury may, in estimating *compensatory* damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action, although there may be circumstances of mitigation, not amounting to a justification. (*See note, p. 528.*)

MOTION for leave to file petition in error. Action of libel. Judgment for plaintiff. The opinion states the point.

White, Walters & McKnight, for the motion.

J. M. Wells, F. D. Baylis and C. C. W. Naylor, contra.

GILMORE, J. The District Court reversed the judgment of the Court of Common Pleas, solely on the ground that the latter court erred in instructing the jury that in estimating compensatory damages, the reasonable fees of counsel employed by the plaintiff in prosecuting his action might be taken into consideration.

This is the only point that has been argued by counsel on either side, and is the only point that will be considered in the opinion.

While there is a conflict in the authorities as to whether counsel fees can be allowed in estimating damages, in actions of tort, where no wrong, in the moral sense of the term, is complained of, it seems to be settled in this State, at least, that in cases proper for the infliction of exemplary damages, such fees may be taken into consideration by the jury in estimating the damages of the injured party. There is also conflict in the authorities, as to whether, in the latter class of cases, the counsel fees of the injured party are to be estimated and allowed as compensatory damages, or whether they are only to be considered by the jury in estimating the exemplary damages that the injured party is entitled to recover. This is, however, no longer, if it ever was, an open question in this State.

Stevens and Wife v. Handly, Wright, 121, was an action of slander, in which the words spoken were actionable *per se*, and were spoken in an aggravating manner, indicating malice. In mitigation of damages, it was argued, that they were spoken under provocation and a misapprehension of facts. The court instructed the jury, that if the words were uttered under circumstances merely mitigating, without justification or excuse, the damages should be *compensatory*; that they should be sufficient to cover all the expenses and costs of the plaintiff in litigating the matter, and including their loss of time—such as will make them whole; and if they were spoken without excuse or mitigating circumstances, the damages should be exemplary, to express the estimation in which the jury hold a good character in society, and their reprehension of the habit of wantonly attacking it. The first hypothesis presents a case for compensation only, yet we have no doubt that when the court spoke of “all the expenses,” the counsel fees of the injured party in the suit were intended to be included, though they are not in terms mentioned; indeed it must be so, for the court speaks of “costs” and “loss of time” as matters to be compensated, in addition to “all the expenses”—“such as will make them whole.” The injured party would not be made whole as to all expenses, unless his counsel fees were covered and included. The second hypothesis presents a case where the words were maliciously spoken, without excuse or mitigating circumstances, and in which the court says the damages should be exemplary; and the reasons given for this show, that the court did not intend that the exem-

plary damages to be given in such a case should include any thing that had just before been spoken of as compensatory damages ; but damages in addition to compensation.

The case of *Sexton v. Todd*, Wright, 816, is to the same effect. The case of *Roberts v. Mason*, 10 Ohio St. 277, was an action to recover damages for an assault and battery, committed under aggravating circumstances. On the trial, in the Court of Common Pleas, the instruction complained of was as follows: "The jury are at liberty, if they see fit, to allow the plaintiff, as part of his actual or compensatory damages, any reasonable expenditure for counsel fees, which are necessarily incurred in the prosecution of this suit. But the law leaves this to the discretion of the jury, under all the circumstances of the case."

This instruction was held not to be erroneous, but the judge writing the opinion seems to have hesitated about affirming it in terms. He says: "In cases where the act complained of is tainted by fraud, or involves an ingredient of malice or insult, the jury, which has power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees, in their estimate of damages." This language is open to the inference that counsel fees in such cases are to be allowed as punitive, and not as compensatory damages. In the syllabus of the case, however, it is said: "In such a case the jury may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees for counsel employed by the plaintiff in the prosecution of his action."

There is a manifest discrepancy, as above indicated, between the language of the opinion and the syllabus. In argument, this case is the only authority cited and relied upon by counsel on the respective sides of the case before us. Mr. Sedgwick in his treatise on the Measure of Damages (6th ed., 111), in a note, after quoting the language of Judge BRINKERHOFF, in *Roberts v. Mason*, says: "But although in this (Ohio) and some other States counsel fees are permitted to be considered by the jury in fixing the damages — and, indeed, can practically hardly be excluded from their consideration where, in actions of tort, the law does not furnish an exact measure — it is difficult to see why such expenses should be allowed under the head of exemplary damages. The plaintiff's counsel fees are an expense incurred by him, and their re-imbursement to him brings the measure of damages back toward the standard of com-

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pensation. It is an item of compensation, indeed, not usually allowed on what still seems to be the theory of the law, that every man can be his own advocate; but, nevertheless, it is really compensation. * * * The allowance of counsel fees, or their supposed equivalent, in this class of cases, must be regarded as the result of an instinct or inclination on the part of the bench to return to the standard of compensation." In this connection he cites *Fairbanks v. Witter*, 18 Wis. 287, in which similar views are expressed, the court saying: "Counsel fees can no more be allowed in actions where punitive damages can be given than in others;" and that if they can "be assessed by the jury, it must be on the principle that they are consequential damages, and relate to the amount of compensation, rather than refer to damages which may be inflicted by way of penalty or punishment for aggravated misconduct."

It will be seen that the learned author, while dissenting from what he supposes to be Judge BRINKERHOFF's view, that counsel fees in such cases may be allowed by the jury as a punishment, or as exemplary damages; proceeds to show that such fees are an expense incurred, and that their re-imbursement to him is really compensation.

This is substantially the rule as expressed in the syllabus in *Roberts v. Mason*, and is certainly in accordance with the spirit of the rule as laid down in *Stevens v. Handy*, and *Sexton v. Todd*, above cited.

In this State it must, therefore, be regarded as settled, that in actions of tort, involving malice, fraud, insult, or oppression, the jury may, in estimating *compensatory* damages, take into consideration the reasonable counsel fees of the plaintiff in prosecuting his action for the redress of his injuries, against the wrong-doer, even where there are mitigating circumstances not amounting to a justification.

In the case before us, it is charged in the petition that the libel was published maliciously, and with the intention of injuring the plaintiff and destroying his business, and that the defendants confederated together for this purpose.

The testimony, which is made part of the record by bill or exceptions, certainly tends to establish the charges in the petition. If the charges were fully proved, which was left to the jury, enough was shown to evince an intention on the part of the defendants to

oppress the plaintiff and crush out his business, and it was for these that he sought, and for which the law entitled him to recover, damages.

On the other hand, while the testimony did not make a justification or legal excuse for the acts of the defendants, intended to show that the defendants may have acted under a misapprehension as to the main facts, and which the plaintiff's acts may have lent color to, and all of which the jury was instructed to consider in mitigation of damages. This is substantially the case presented in *Stevens v. Handley*, in which the jury was instructed to allow full compensation—to make the plaintiffs whole; and which were construed to include their counsel fees. This case seems to have been followed by the court in its instructions to the jury in the case before us. The clause of the charge excepted to is not drawn with accuracy and fullness of expression in itself, but when taken in connection with the whole charge, which is set out, we do not find it erroneous; and we see no reason to apprehend that the jury could have been misled by it to the prejudice of the defendants. The District Court, therefore, erred in reversing the judgment of the Court of Common Pleas.

There were many other exceptions taken, and assigned for error on the record, all of which we have considered but find no errors to the prejudice of the defendants below.

Motion granted. The judgment of the District Court reversed, and that of the Court of Common Pleas affirmed.

Judgment accordingly.

BOYNTON, J. I place my concurrence in the decision in this case on the ground that the publication of the defendants below, set out in the petition, being shown to be untrue, is a libel. I am not prepared to agree that counsel fees, in any action in tort, constitute a proper item for compensation in damages, unless the case is one in which the jury would be justified in awarding punitive or exemplary damages.

NOTE BY THE REPORTER.—In *Armstrong v. Pierson*, 8 Clarke (Iowa), 30, a charge that compensatory damages are such as will repay the costs and trouble of the suit, and of disproving the defendant's allegations, was held correct. In Connecticut the doctrine of the principal case prevails. *Welch v. Durant*, 36 Conn. 83; *Platt v. Brown*, 30 id. 336. And so in *Marshall v. Betner*, 17 Ala. 833, an action for malicious prosecution, the court said: "We can readily perceive the justice and good sense of the rule which requires a party who wantonly and maliciously abuses the process of the court, or sues out an attachment for the purpose of worrying or harassing the defendant without probable cause, to make

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geed his losses, and to furnish complete reparation and indemnity for the injury his malice has occasioned ; " and allowed the counsel fees of the defendant in the original suit to be proved and considered by the jury in estimating the damages. Mr. Sedgwick says (Mass. Dam. marg. p. 98), " It may on principle, I think, be considered clear that in cases proper for the infliction of vindictive or exemplary damages, the jury, in estimating those damages, have a right to take into their consideration the probable expense of the litigation."

On the other hand in *Barnard v. Poor*, 21 Pick. 373, an action of trespass for gross negligence, the court held, that " the counsel fees and other expenses of prosecuting the suit, not included in the taxed costs, cannot be taken into consideration in assessing damages." The same was held in *Lincoln v. Saratoga and Schenectady R. R. Co.*, 23 Wend. 435, an action on the case of negligence for personal injuries. In *Day v. Woodworth*, 13 How. 363, an action for pulling down a dam, the court say : " It is true that damages assessed by way of example may thus indirectly compensate the plaintiff for money expended in counsel fees ; but the amount of these fees cannot be taken as the measure of punishment, or as a necessary element in its infliction." To the same effect is *Welch v. The South-eastern R. R. Co.*, 12 S. C. (Rich.) 290. In *Hicks v. Foster*, 13 Barb. 663, the Supreme Court of New York held that it was error for the judge, in an action of slander, to charge that in awarding damages the jury might take into consideration the expenses to which the plaintiff had been put by being compelled to come into court to vindicate her character. See, also, *Hoadley v. Watson* (45 Vt. 289), 12 Am. Rep. 197, and note, 192.

In New York the jury are allowed to be told what amount of damages will carry costs. *Elliott v. Brown*, 2 Wend. 500 ; *Waffle v. Dillenbeck*, 23 N. Y. 58. In England the decisions are conflicting. The contrary of the New York rule was held in *Levy v. Mune*, 12 Moore, 418 ; 4 Bing. 195 ; and per BRAMWELL, B., in *Kilmore v. Abdoolah*, 27 L. J. Ex. 307 ; and a recent case of *Bradlaugh v. Brooks*, at nisi prius ; while the New York rule was agreed to by POLLOCK, C. B., in *Kilmore v. Abdoolah*, *supra*, and in *Wakein v. Morris*, 2 F. & F. 26. In *Waffle v. Dillenbeck*, *supra*, the Supreme Court (23 Barb. 126), considered that their decision, which was consonant with that in the Court of Appeals in the same case, was not in conflict with *Hicks v. Foster*, *supra*, for there " the law regulating costs and the question of punitive damages were not alluded to ; " and that the court there said correctly that " *Elliott v. Brown*, however, has no application to the question we are considering." This draws the distinction between costs and counsel fees.

JOHNSON V. SHARP.

(31 Ohio St. 611.)

Foreign assignment — delivery by mail — comity.

S., a resident of this State, and a creditor of W., who resided in the State of Missouri, prepared and sent to W., for execution, a deed of assignment to himself, in trust, of all the debtor's property, real and personal, situate in this State, " for the benefit of all his creditors, under the insolvent laws of Ohio," which deed W. duly executed and placed in a post-office in the State of Missouri, addressed to S., in the State of Ohio, who received the same by due course of mail, and immediately entered upon the execution of the trust. Held, the assignment was complete and effectual to pass title to the assignee, from the time the deed was placed in the post-office, as against subsequent attaching creditors.*

* See *Paine v. Lester* (44 Conn. 196), 25 Am. Rep. 442.

ACTION to recover personal property. The opinion states the case. Judgment for plaintiff.

Trainer & Cook, for plaintiff in error.

Hays & McCauslin, contra.

MCLLVAIN, J. [Omitting preliminary considerations.] The sole question in the case is, did the assignment of the attached property from Wallace to Sharp take effect, as against the attachment of the plaintiff in error, under the rules of the common law?

The inquiry therefore arises, first, was the contract of assignment complete, as a common-law contract, before the attachment was levied? The record shows that the deed of assignment was prepared by Sharp, the assignee, who was a creditor of the assignor, and a resident of the State of Ohio, and was sent to Wallace, the assignor, who was a resident of the State of Missouri, for execution; and that Wallace having duly signed, sealed, and acknowledged the same, deposited the deed in the post-office at Rolla, in the State of Missouri, to the address of Sharp in the State of Ohio, at the hour of 7½ o'clock A. M., of November 16, 1874, which was seven and a half hours before the attachment was levied upon the property. The deed was received by Sharp in due course of mail, who immediately entered upon the execution of the trust. In our opinion the assignment was complete and effectual to pass title to the assignee, *eo instanti*, that the deed was placed in the post-office. By that act the assignor ceased to have control of it, and having placed it in the mail for Sharp, the assignee, who, by his previous conduct, had consented to accept the trust, the possession of the carrier must be regarded as the possession of the assignee. This view is sustained by the following authorities: *Prince v. Yates*, 2 Tread. 770; *Dargan v. Richardson*, 2 Cheves, 197; *Merrills v. Swift*, 18 Conn. 257; *McKinney v. Rhoads*, 5 Watts, 343; *Smith v. Bank of Washington*, 5 Serg. & R. 318; *Shubar et al. v. Winding*, 2 Cheves, 218; *Wilt v. Franklin*, 1 Binn. 502; *Skipwith v. Cunningham*, 8 Leigh, 271; *Read v. Robinson*, 6 Watts & Serg. 329.

The next inquiry is, whether the assignment, being executed in Missouri, of property situated in Ohio, was effectual to pass title as against subsequent attaching creditors in the latter State?

The proposition involved in this inquiry is somewhat analogous

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to the conflicting claims arising under our attachment laws and a foreign bankrupt assignment; but, in our judgment, the solution of the question before us cannot be determined by the weight of the authorities upon the latter; and chiefly for the reason that the principle of comity should be recognized in a greater degree between the members of our Union, which are subject, under the general government, to a common system of bankrupt laws, than between our own and foreign governments with whom we sustain no such intimate governmental relations.

It must be conceded, that the decided weight of authority, in this country, is, that our courts will not subject our citizens to the inconvenience of seeking dividends under a foreign assignment in bankruptcy, when they have the means of satisfying their claims at home; and, possibly, the same may be said when the preference is sought over any involuntary assignment of the debtor's property, made *in invitum* or by operation of law.

But it appears to us that a different rule should be maintained where a voluntary assignment is made in one State of the Union of property situate in another, and in conformity with the policy and requirements of the laws of the latter State. The common right of every one to dispose of his property wherever he may be, and a reasonable acknowledgment of the principle of comity, which should exist between sister States of this Union, would seem to require a different rule, and such doctrine has been recognized in several of the States. *Hanford v. Paine*, 32 Vt. 442; *Farrington v. Allen*, 6 R. I. 449; *Law v. Mills*, 18 Penn. St. 185; *Varnam v. Camp*, 1 Green, 326; *Moore v. Bonnell*, 2 Vroom, 90; *Caskie v. Webster*, 2 Wall. Jr. 131; *Bholen v. Cleveland*, 5 Mason, 174; *Moore v. Willett*, 35 Barb. 663.

In our own State, it was held in *Sortwell v. Jewett*, 9 Ohio, 180, that an assignment made by an insolvent debtor, residing abroad, of lands situate in Ohio, will not be superseded by a subsequent foreign attachment and in *Fuller v. Steiglitz*, 27 Ohio St. 355; 23 Am. Rep. 312, it was held that an assignment of a chose in action by a foreign insolvent debtor for the benefit of his creditors passed the title and right of action to the assignee, as against a subsequently matured cross-demand held by the debtor in this State.

It is true, that great contrariety of opinion on this general subject has been expressed by the courts of this country, but on the whole, we think, that Mr. Wharton, in his work on the Conflict of

Laws, § 353, has fairly stated the view most fully sustained, in these words: "We may, therefore, hold it to be the law in the United States, that an assignment made in one State of personal property in another (such property not being in transit or following the owner's person), passes no title to such property as against attaching creditors of the assignor, such creditors being domiciled in the latter State, when such assignment is invalid by its laws." And we think the implication arising from the language quoted is also sustained by weight of current authorities, namely: that if such assignment be valid, or, in other words, be in harmony with the laws of the State where the property is situated, the title passes, and the rights of the assignee should be protected against subsequent attaching creditors.

There is another ground, however, upon which the assignment should be preferred to the attachment in this case. The assignee was a creditor of the assignor and a resident of this State. The conditions of the trust, as well as the form of the assignment, was in strict conformity to the policy and laws of this State; and by the express terms of the assignment the trust was to be administered "for the benefit of all his (the assignor's) creditors under the insolvent laws of the State of Ohio." Now, surely, under these conditions, the assigned property also being in this State, there can be no good reason found, why the courts of this State should refuse to recognize and administer this trust for the beneficiaries in as full and ample a manner as if the assignment had been executed in this State or by a resident of this State. Surely the rights and conveniences of our own citizens under such an assignment should not be deferred to those of a subsequent attaching creditor residing in another State.

Judgment affirmed.

THE AMAZON INSURANCE COMPANY V. WALL.

(21 Ohio St. 688.)

Insurance — knowledge of agent — estoppel.

A policy of insurance issued to a mortgagee contained a stipulation that if any change took place in the title or possession, the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property and satisfied the mortgage. *Held*, that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, that such assigned policy shall have the force and effect of a new policy to the purchaser, will bind the company.

MOTION for leave to file petition in error. Action on policy of fire insurance on property of Hamilton. Parker was agent of the Amazon Insurance Company, with full power to receive proposals for insurance against loss or damage by fire or lightning, and to make insurance by policies of the company, countersigned by himself as such agent, and to renew the same, assent to assignments or transfers, and in all other matters and things to attend to the business and duties of the agency, in manner and form prescribed by the company. As such agent he issued a policy to Gillespie, as mortgagee of said property. Hamilton afterward conveyed the property to Wall, and received in exchange a farm in Champaign county, Ohio. Wall desiring to have the property unincumbered, induced Gillespie to take in lieu of his mortgage, a mortgage on the Champaign county farm, and assign his policy to Wall. Subsequently the insured property was burned. The opinion states the other facts. Wall had judgment.

Long, Kramer & Kramer, for the motion. The assignment by Gillespie to Wall, and the consent of Parker thereto, does not make a new policy, nor change the original memorandum of the insurance. *Bates v. Equitable Ins. Co.*, 10 Wall. 33; *Eastman v. Carroll County Ins. Co.*, 45 Me. 307; *Smith v. Saratoga Co. Ins. Co.*, 3 Hill, 510; *Fogg v. Middlesex Ins. Co.*, 10 Cush. 337.

Lipman Levy, contra.

OKEY, J. [Omitting a minor question.] The strongest objec-

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tion to a recovery, no doubt, is, that the property was sold and conveyed to Wall; that Gillespie accepted a mortgage from Hamilton, on a farm in Champaign county, in lieu of his mortgage on the mill; that this was done without the knowledge or assent of the insurance company or its agent; that by the terms of the policy it became void when there was a change in the title or possession of the property; and that where a policy is terminated in this way without notice to the insurer, and without his fault, such insurer may retain the unearned premium; so that there would be no consideration for the agreement with Wall. We need not decide how tenable, under other circumstances, this position might be; for, as we have seen, Wall desired insurance on the property, and it was quite immaterial to him whether he obtained it through a new policy or by an assignment of the policy issued to Gillespie. The exact condition of the property — the conveyance to Wall and the new mortgage to Gillespie — was fully explained to Parker, the agent, and with such knowledge he agreed that Gillespie's policy, when assigned to Wall, should have the force and effect of a new policy. Wall, believing Parker's statement that this was the proper course, relied and acted on it. Under such circumstances, however the transaction may be viewed, it is very clear that the company is estopped to deny such act of its agent. Wood on Ins., § 407; *Pratt v. New York Central Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 304; *Ætna Ins. Co. v. Olmstead*, 21 Mich. 246; 4 Am. Rep. 483. This, of course, is opposed to *Cockerill v. Cincinnati Mut. Ins. Co.*, 16 Ohio, 148. But that case, holding that verbal agreements with respect to insurance are invalid, is virtually overruled in the *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612. And see *Relief Fire Ins. Co. v. Shaw*, 94 U. S. 574; Wood on Ins. 10; May on Ins. 41; Flanders on Ins. 118.

[Omitting a minor question.]

Motion overruled.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

MARLING V. MARLING.

(9 W. Va. 79.)

Real — gift of land by unsealed instrument — power of equity to effectuate.

A court of equity will effectuate a gift of lands by a father to his child, evidenced only by an unsealed instrument delivered to the child.

SUIT to compel a conveyance of land. The opinion states the facts.

William P. Hubbard, for appellant.

Joseph H. Pendleton, for appellees.

GREEN, J. Mary Marling and Elizabeth Marling brought a suit, in chancery, in the Circuit Court of Ohio county, in 1873, against their father, Elijah Marling, to compel him to convey to them a certain farm, in that county. It appears that in 1845, Elijah Marling bought this farm of Hardesty, and it was conveyed to him; that, shortly thereafter, he put his said daughters in possession thereof and they have ever since lived upon this farm. On May 3, 1863, in consideration, only, of his love and affection to them, he executed and delivered to them this paper :

“ I sine all my Interest and claim unto Mary Marling and Elizabeth Marling, the farm they now live on, *coled* the *Harsty* farm, as witness my hand and *sel*.
ELIJAH MARLING.”

The Circuit Court of Ohio county ordered Elijah Marling to execute, with special warranty of title, a deed of said farm to them. From this decree, Elijah Marling has appealed to this court.

The question presented to this court for the first time is, whether a court of equity should furnish its aid in making effective a gift, of land, by a father to his child where the gift is evidenced by an unsealed instrument, executed by the father, and formally delivered to the child.

Where there is no consideration of any kind, the courts have decided that where a trust is actually created, and the relation of trustee and *cestui que trust* established, a court of equity will, in favor of a volunteer, enforce the execution of the trust; although it will not create a trust, or establish the relation of trustee and *cestui que trust*, by giving effect to an imperfect conveyance in favor of a volunteer. *Ellison v. Ellison*, 6 Ves. Jr. 656; 1 Lead. Cas. in Eq. 199. It has also been held that a declaration, by a party, that property shall be held, in trust, for the objects of his bounty, though unaccompanied by any deed or other act divesting himself of the legal estate, is an executive trust, and will be enforced; and if the property is personal, such declaration may be by parol, without any writing. *Pye & Dubost, ex parte*, 18 Ves. Jr. 140; *McFadden v. Jenkyns*, 1 Hare, 458; s. c., 1 Ph. 153. *A court of equity, in such cases, not being governed by the analogy of uses, for a use could not arise by parol agreement, without a deed, except where the consideration is valuable.* *Jones v. Morley*, 12 Mod. 161. When the consideration is meritorious, such as the obligation of a parent to provide for his child, will a court of equity establish the relation of trustee and the *cestui que trust*, by giving effect to an imperfect conveyance, or by enforcing the specific performance of an executory agreement? There are expressions in the opinion of Lord ELDON, in the case of *Ellison v. Ellison*, and of Lord THURLOW, in the case of *Colman v. Sarrell*, 1 Ves. Jr. 50, which show that they supposed a court of equity would, in such case, afford aid, if the consideration was meritorious; though this question was not before the court in these cases. And in the case of *Ellis v. Nimmo*, L. & G. temp. Sugd. 233; 10 Cond. Eng. Ch. 534, Lord SUGDEN decided this question in the affirmative, after the most mature consideration. In that case the father, John Nimmo, agreed with his son in law, Brabazon Ellis, that he would settle upon his daughter, Mrs. Ellis, £50 a year, during her life, to be raised out of a certain

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estate owned by him. The agreement was reduced to writing and signed by John Nimmo, but not sealed. The Lord Chancellor says: "In this case the question is, whether the consideration is sufficient to support a post-nuptial agreement in writing, entered into by a father in favor of his child. I should say the agreement ought to be specifically executed, if we look back we shall find what was the consideration necessary to raise a use before and after the statute." In *Gilbert on Uses*, 92, it is laid down, "if a man, in consideration of natural love and affection, covenants to stand seized to the use of his son or brother, nephew or cousin, this is a good use." Upon a covenant to stand seized for the benefit of a wife or child, equity held such a consideration sufficient to bind the estate. That was a use before the statute; that use the statute executed and turned into a possession; still it rested upon the original equity. A covenant to stand seized was merely an agreement founded on a good or meritorious consideration, and the statute executed the agreement.

But though covenants to stand seized, before the statute, were mere contracts, which equity, specifically, enforced, yet as the statute operated upon them, they were, at once, distinguished from mere agreements or contracts, resting *in fieri*, to settle an estate, just as bargains and sales, which, before the statute, were contracts to sell, became actual conveyances by force of the statute, and were not confounded, after the statute, with simple contracts to sell; and which, from their nature, could not be deemed executed. How far the consideration, which, before the statute, was sufficient to support a covenant to stand seized, or a bargain and sale, could sustain a contract, to sell or settle an estate, since the statute, so as to enable equity to specifically enforce it, has been the subject of much judicial investigation. In *Fothergill v. Fothergill*, Freem. Ch. 256, it was held "that whenever a conveyance was made upon a good consideration, if there be any defect in the execution of it, that this court hath always supplied the defect; and though provisions for a wife and children after marriage are not valuable considerations, yet they are good considerations, and were always helped in this court." In *Chapman v. Gibson*, 3 Bro. C. C. 229, a surrender was supplied in favor of the wife against the heir at law, Lord ALVANLEY saying, that he thought the execution of a power and a surrender of a copyhold go hand in hand, precisely on the same ground. Now equity always assists a defective execution of

a power voluntarily executed in favor of a wife as depending upon the natural obligation. But the court did not treat every consideration, which would have raised a use before the statute, as sufficient to justify its interference after the statute.

In *Watts v. Bullas*, 1 P. Wms. 60 (a case found fault with by Lord HARDWICKE in *Goring v. Nash*, 3 Atk. 189), a voluntary conveyance to a brother of the half blood, defective in law, was made good in equity. The Lord Keeper's opinion was that as a *cestui que use*, before the statute in such case, could have compelled an execution of the use, in a court of equity, so would this imperfect conveyance raise a trust, in respect of the consideration of blood, and, consequently, ought to be made in good equity. The principle was correct, Lord HARDWICKE thought, but it was carrying it too far; for it would carry it to the remotest blood, that could raise a use in law, and which this court does not regard; the Chancellor then reviews the cases of *Stephens v. Trueman*, 1 Ves. Sen. 73; *Goring v. Nash*, *supra*; *Osgood v. Strode*, 2 P. Wms. 249, *Colman v. Sarrel*, 3 Bro. C. C. 128 and 1 Ves. Jr. 50, and concludes thus: "In my opinion, the contract should be specifically executed, though I have great hesitation in laying down this principle, and took time to consider it further." And two months afterward, having maturely considered the subject, he says: "The question is, whether an agreement, for a meritorious consideration, resting *in fieri*, is such a contract as a court of equity will enforce.

"I stated on a former occasion that, before the statute, the courts compelled the specific performance of agreements, for valuable or meritorious considerations; and they viewed meritorious considerations in a very favorable light, holding them to include, not merely a wife or a child, but some collaterals, as a brother, nephew or cousin. A covenant to stand seized was a mere contract or agreement by a person to settle or hold his estate for the benefit of his family; and a meritorious consideration alone, without a valuable consideration, was sufficient to support such a contract. Afterward came the statute for transferring uses into possessions. That statute made no other change than that of transferring or turning the use into a possession, which carries the legal right. Now in that view, the statute operated on the original consideration. In the case of bargains and sales, the use is still raised, by reason of the old doctrines; money or rent was sufficient to raise such a use upon a bargain and sale, which was originally a

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contract for sale, in a lease executory. Equity, before the statute, raised the use, and after the statute, the use was operated upon by the statute. Covenants to stand seized were quaintly called conveyances not operating by transmutation of possession. The further interference of equity would seem to have been excluded, but the general voice being in favor of uses, modes were invented for their re-introduction, in spite of the statute, and the statute itself simply operated to introduce new modes of conveyance, which would carry the legal estate. But this did not interfere with the ancient equities, or the operation of the statute upon them : suppose a bargain and sale, in consideration of five shillings, the statute would operate on that, and vest the legal estate, because there was a valuable consideration, and equity did not inquire into the amount of it. It became a form of conveyance. Now if, since the statute, it could be shown that five shillings, which is a mere nominal consideration, was the only one, the court would set aside the conveyance, and look into the real merits of the original transaction being still open to investigation in this court, so that the conveyance, as such, still operates, by force of the original equity, that the consideration was sufficient, and yet a court of equity may set aside the conveyance, because it deems the consideration insufficient."

As regards covenants to stand seized, they remain, as before the statute, mere agreements to hold the estate for the benefit of the settlor's family. In *Watts v. Bullas*, 1 P. Wms. 60, the Lord Keeper, who had then recently come out of a court of law, seemed inclined to impart the opinions then formed into equity, and he enforced a conveyance in favor of a brother, of the half blood. Lord HARDWICKE found fault with that, and it certainly was carried too far, but the principle is correct, and there is no reason why equity should not now execute an agreement in the same manner, as, before the statute, it would have compelled an execution of the use, provided it be within the proper limits ; for instance, a provision for a wife or child, defective execution of powers are said to be analogous to this case. Such defective executions and defective surrenders, of copyholds, strictly depend upon the same rules. Now in these cases, the court executes the intention of the settlor, either against his representatives or the person taking the estate, in default of a valid execution of the power or surrender of the copyholds, when there is a good consideration. If there be such

a consideration, the party taking the estate is not permitted to rely upon the defect; but the court will effectuate the intention of the settlor, and, speaking generally, this equity is enforced, not against the settlor himself, but in his favor, that is in the execution of his intention, and at the expense of a third party. That rule is now settled. But this case does not rest, exactly, on the same grounds as defective executions of powers, as in cases like the present, there is a contract; whereas the former do not arise out of a contract, but depend upon an intention to settle. In all such cases, however, the court requires a sufficient consideration, and I find a provision for a wife or child is held a meritorious consideration, proper to call into action the power of a court of equity, in aid of a defective execution or surrender. Now in my opinion it makes no difference whether that power is required to aid a defective surrender, or to enforce an agreement *in fieri*; in each case a sufficient consideration is necessary to enable the court to act; in the one case it has been established what is a sufficient consideration, and that must apply, equally, to the other case.

"I have before me a contract, which I am bound to enforce, if there is a sufficient consideration. The consideration is such as would enable the court to remedy even a defective settlement, where there is no contract. I think it, *a fortiori*, sufficient to sustain an actual contract, and I shall, therefore, decree a specific performance of the agreement."

The authority of this case was, however, weakened by the case of *Dillon v. Coppin*, 4 Myl. & Cr. 647, 18 Eng. Ch. R. 646. It was the case of an imperfect transfer; and the circumstances did not indicate an absolute intention of the parent to make it. The father retained the deed in his possession, during his life, and had indorsed, on an envelope on the deed, that it was to be given to his daughter. The case was also between children of the same testator. It was also further weakened by the decision of *Jefferys v. Jefferys*, 1 Cr. & Ph. 138; 18 Eng. Ch. R. 137. The case was that of a child, to whose use the father had covenanted to surrender a copyhold, against the wife, to whom he had devised it; and who, after his death, had been admitted. The two claims were equally meritorious — the children and the widow. The court refused its aid. And in the case of *Moore v. Crofton*, 3 Jo. & Lat. 442, Sir EDWARD SUGDEN found himself obliged to yield to the current of authority, and to admit *Ellis v. Nimmo* to be overruled. He,

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however, declared that he still thought it decided, upon sound principles of equity. But the tendency of American authorities is to sustain the principles laid down by Lord SUGDEN in this case.

In the case of *Thompson v. Thompson*, 3 Miss. 737, the court of appeals cancelled an instrument of writing, whereby a father gave to his children thirteen negroes, after his death, the negroes to remain in his possession. The instrument of writing was not under seal, and, though delivered, it was alleged, though not proven, that it was an imperfect paper to be held, during the pleasure of the donor. The court say that their decision would have been the same, had the instrument been a deed. In *Taylor v. Taylor*, 2 Humph. 597, the court set aside, as a deed, a sealed instrument, by which he gave to his son certain slaves. It was witnessed and deposited in his trunk, with the declaration, made to several parties, that it should take effect at his death, but not before. The court declared that the instrument was inoperative, as a deed but retained the case, with leave to the son, if he could, to have the paper propounded, in the proper court as a will.

In *Martin's Admr. v. Ramsey*, 5 Humph. 349, a deed of gift was found amongst the papers of a dead man, executed by him to his daughter, and witnessed; there was no evidence, from his conduct or declarations, that he considered the act complete when he acknowledged the deed; the court, therefore, held the property to belong to the administrator of the father. But in the case of *Graham & Co. v. Lambert*, 5 Humph. 595, the father executed to his daughter an absolute conveyance of all his negroes and other personal property, retaining a life estate to himself; at the same time he took from her a bond, to her brothers and sisters, agreeing to divide this property equally among them, herself included, at her father's death. He subsequently surrendered this bond to her, she retaining the deed. *Held*, that the bond and deed together constituted a conveyance and settlement of his negroes and other property, on all his children, which is supported by the consideration of love and affection; and the bond could not be surrendered without the consent of those for whose use it was made.

In *re Campbell's estate*, 7 Barr, 101, an uncle directed a promissory note to him of a nephew, to be given up or destroyed, but it was never done. *Held*, that the nephew was not thereby released from the payment of the debt to the uncle's administrator. And in *Henderson's Admr. v. Henderson*, 21 Mo. 379, the same was held

when a father had directed his son's note to be surrendered, but which had not been done. In *Kennedy's Exr. v. Ware*, 1 Barr, 445, Chief Justice GIBON, in delivering the opinion of the court, held that an equitable assignment of a *chose in action*, in consideration of natural love and affection, is void; but the same judge in *Dennison v. Goehring*, 7 Barr, 179, says, "But even if it were to take the deed to be not a conveyance of the legal estate in trust, but an executory agreement to create a trust, it is far from clear that the result would be different. Natural affection, though not a valuable, is a meritorious consideration, on the foot of which, an agreement by a father to secure a provision for his child has been enforced in equity, by reason of the obligation of parents to provide for their offspring. Thus a covenant with a son to renew a lease was enforced, in *Husband v. Pollard*, cited, 2 P. Wms. 467; and in *Goring v. Nash*, 3 Atk. 189, a father's covenant to settle an estate on his son was specifically executed. In such a case, a legitimate child is not held to be a volunteer, though it was held, in *Fursaker v. Robinson*, Prec. in Ch. 475, that a bastard is so. In corroboration of the principle, may be mentioned those cases in which equity has supplied the surrender of a copyhold and the defective execution of a power in favor of an illegitimate child."

In *Pennington's Admr. v. Gitting's Exr.* 2 Gill & Johns. 208, it was held that certificate of bank stock, indorsed by father and delivered to a son, would not sustain a bill in equity for the transfer of the stock. The court says, "The consideration of natural love and affection is sufficient in a deed; but a mere executory contract, that acquires a consideration, cannot be supported on the consideration of blood or natural love and affection; there must be something more; a valuable consideration, or it is not good and cannot be enforced at law, but may be broken at the will of the party. And being void at law, chancery cannot sustain and enforce it." But in the case of *Haines v. Haines*, 4 Md. Ch. Decisions, 133, JOHNSON, Chancellor, seemed to consider that a court of equity should deal favorably with an agreement to convey land by a parent with a child, and it would be supported by a slight consideration, and on an appeal from his decision, 6 Md. 435, the Court of Appeals of Maryland held that, where a father executed a written contract under seal, whereby he agreed, in consideration of \$5 received, to convey to his daughter a tract of one hundred and seventy acres of land, of which he had put her in possession, a court of equity

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would, on her application based on his paper alone, decree a specific performance.

In North Carolina, it is held that a deed, from a husband to a wife for slaves, cannot have the effect of vesting the title in her, yet it amounts to a declaration of trust in her favor. *Huntly v. Huntly*, 6 Ired. Eq. 514; *Garner v. Garner*, Busb. Eq. 1. The court in the last case quotes from Adams' Equity, approvingly, "Although a promise made without a valuable consideration is void, yet if an intended gift, on meritorious consideration, be imperfectly executed, and if the intention remains unaltered, at the death of the donor there is an equity to enforce it in favor of his intention against persons claiming by operation of law, without an equally meritorious claim."

In the case of *Hays v. Kershow*, 1 Sandf. Ch. 258, the Assistant Vice Chancellor says, "Covenants and agreements, founded on a good consideration, or oftentimes expressed on a meritorious consideration, are however upheld and enforced specifically in this court. And it has been a mooted question whether collateral consanguinity, as that of a brother, nephew, niece, etc., was not a meritorious consideration. I think it is now settled upon authority, it is not. In the case before us (which was a voluntary executory agreement, to convey to a niece), there was no moral obligation to provide for a wife or children, or a parent; and there was, therefore, no such good or meritorious consideration as will induce this court to decree the performance of the covenant in the sealed instrument in question," but he, with much difficulty, held this instrument and another executed at the same time, taken together, might be construed to constitute an executed trust, and as such, he enforced them. And in *Bunn v. Winthrop*, 1 Johns. Ch. 329, the Chancellor says, "The grantor, a man of very large fortune, was bound in reason and justice to provide for his mistress, and child by her. The innocent offspring of criminal indulgence has a claim for protection and support, which a court of equity cannot and do not disregard." This language, however, it should be remembered, was used, in a case in which he held that a trust was not executory but executed.

In Kentucky, by a series of decisions, it is well settled that a voluntary agreement, by a father with a child, to convey land, will be specifically executed. *McIntire v. Hughes*, 4 Bibb, 186; *Mahan v. Mahan*, 7

B. Monr. 579; *Bright v. Bright*, 8 id. 194. But in *Buford's Heirs v. McKee*, 1 Dana, 107 it was decided that such voluntary agreement in favor of a niece would not be specifically enforced. In *McIntire v. Hughes* the court uses this language: "It is true a court of equity will not enforce the specific execution of a contract which is merely voluntary; but the obligation by McIntire to his son is evidently not of that description. The relation between them of father and son is not only alleged in the bill, but is apparent on the face of the obligation, and that relation, though not a valuable consideration, is deemed in law a good consideration.

Under the statute of uses, the proximity of blood between the father and son is sufficient to support a covenant by the former to stand seized for the use of the latter; and if so prior to the statute it must have been a sufficient consideration to have created the use; for the statute could only operate to transfer the possession to the use, where there is a use created. Now a use, prior to the statute, was similar to what is denominated a trust since. It gave to the *cestui que use* no right to the thing, but it gave him a right in equity to demand the thing. And prior to the statute, it was the common practice to resort to a court of chancery to enforce the execution of a use as it still is to enforce the execution of a trust. The inference is, therefore, clear that proximity of blood has always been a sufficient consideration to warrant the interposition of a court of equity, where there was no other circumstance in the case which forbade such interposition.

Whether if the contract is not by deed, a court of equity would when there is no other consideration than that of blood, decree its specific performance, is not material to decide; nor is this court to be understood as giving any opinion on that point; for in this case the contract is under seal."

In *Darlington v. McCooles*, 1 Leigh, 36, the contract sought to be enforced was a mere verbal one; the court says, "There is, in this case, neither a valuable, nor a meritorious consideration, without one of which, a court of equity will not aid a defective conveyance, much less enforce a bare agreement, even were it in writing;" though this is an *obiter dictum*, it would seem from it that the court thought that, if there was a meritorious consideration, the court would enforce a contract in writing, though not under seal. In *Jones and Wife v. Obenchain*, 10 Gratt. 259, it was held that a deed from a husband to his wife, conveying to her all his property,

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real and personal, under circumstances showing a strong meritorious consideration, should be set up, in equity, against a nephew, the heir at law, of the grantor.

The case of *Shepard v. Shepard*, 7 Johns. Ch. 63, is referred to by the court as a similar case, and we have seen there are two similar cases, which have been decided, in like manner, in North Carolina. In the case of *Caldwell v. Williams*, Bailey's Eq. 175, Chancellor HARPER says, "Some agreements which are termed voluntary are executed in this court, when made in favor of a wife or children; but they are always agreements, by deed or covenants; agreements under seal, which imports a consideration, and renders them valid, at law. There is no instance of an agreement being enforced which is not only voluntary, in the equity sense of the word, but is also *nudum pactum*." But this was a mere *obiter dictum*, as the case before the court was a mere verbal contract.

It would, obviously, be impossible to reconcile these American cases. But we may safely say that the principles laid down in *Ellis v. Nimmo*, by Lord SUGDEN, are approved by the weight of American authorities.

The question whether a voluntary executory agreement, based on a meritorious consideration, must, necessarily, be under seal before it will be enforced, specifically, by a court of equity, seems to be undecided. We propose now to consider this question. The argument, which makes the aid furnished by a court of equity, in such cases, to depend upon whether the instrument is sealed or unsealed, is thus presented by Lewin in his Treatise on Trusts, 95, "In regard to covenants to stand seized to uses, it is evident that mere meritorious consideration was not sufficient ground to attract the jurisdiction of the court; for no use would have arisen in favor of a wife or child, unless there had been a *covenant*. Lord Chief Justice HOLT said (12 Mod. 161), if a use were without transmutation of possession, the use then does not arise by virtue of any declaration or appointment, but there must be some precedent obligation, to oblige the party declaring the use, which must be founded on some consideration; for a use having its foundation on grounds of equity could not be relieved in chancery without transmutation of possession, or an agreement founded on a consideration—and therefore, if bargain and sale was made of a man's land, on payment of the money, the use would have arisen, without deed, by parol; but if the use was in consideration of blood, then it would

not arise by parol agreement without a deed; because that agreement was not an obligatory agreement — it wanted a consideration, and, therefore, to make it an obliging agreement, there was necessity of a deed. Thus if equity be governed by a strict analogy of uses, the court cannot act upon meritorious consideration, when the contract is by parol, though when the contract is under seal the analogy applies." This reasoning is unsatisfactory; for a court of equity has, in many instances, as we have seen, not been governed by a strict analogy of uses. For we have seen that a mere declaration in writing, and in the case of personal property, a mere verbal declaration by the owner of property, though unaccompanied by any deed or any act divesting himself of the legal title, a court of equity now regards as an executed trust, and will enforce it specifically. Again, as we have seen, and as admitted by Lewin, page 96, a covenant to stand seized to the use extended to collateral relations; but now a court of equity never aids a collateral relation, for a man is under no obligation to make provision for his collateral relations, but only for his immediate family, his wife or children. And as another instance of a departure from the strict analogy of uses, a bargain and sale for a nominal consideration of \$1, still operates, by way of conveyance, to transfer the estate; but now, if the bargain and sale be void for want of seal or any other reason, a court of equity would, undoubtedly, decline its aid to such a bargainee, on the basis of a trust. This is admitted by Lewin, page 96, and in the case of *Buford's Heirs v. McKee*, 1 Dana, 107. The court, speaking of this, says: "The idea which seems to have had some countenance, from a few old cases, that an agreement in writing would be specifically enforced merely because it was solemnized by the signature and seal of the party, has been long exploded." Yet if we were to follow the analogy of uses strictly, such an agreement would now be specifically enforced. It would seem, therefore, that a court of equity now looks to the real consideration of the contract or assignment, and gives or refuses its aid, according to the real merits of the case, disregarding the form the contract or assignment may assume, and declining to follow the strict analogy of uses, when it would lead to inequitable results. The argument of Lewin is, sometimes, varied in form, and it is said there must be a valid and obligatory contract as a preliminary basis to any equitable interference, and then that equity grants its extraordinary aid, only where there is an actual consideration, valuable or meritorious.

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To this form of the argument HARPER, Chancellor, alludes, when in *Caldwell v. Williams*, 1 Bailey's Eq. 175, he says, "there is no instance of an agreement being enforced, which is not only voluntary, in the equity sense of the word, but is also *nudum pactum* at law." To this form of the argument we would reply by referring to what has been said in reply to Lewin's mode of presenting it, and we would add that there are numerous cases, in which contracts or deeds null at law have been specifically enforced at equity, or been aided where inoperative as a deed.

The case of *Ellis v. Nimmo*, *supra*, is an example of a voluntary contract, based on a meritorious consideration, not under seal, and, therefore, a *nudum pactum*, or void at law, being specifically executed in equity. And Lord SUGDEN, in delivering his well-considered opinion, makes no allusion to the instrument on which he was acting, being unsealed. He seemed to regard it as immaterial, whether it was sealed or unsealed. The two cases cited from the North Carolina reports of *Huntly v. Huntly*, and *Garner v. Garner*, *supra*; also *Shepard v. Shepard*, and *Jones and Wife v. Obenchain*, 10 Gratt. 259, *supra*, are all instances of contracts or deeds, void at law, being specifically executed or aided in equity. They were deeds by husbands to their wives utterly void at law, as much so as any voluntary agreement not under seal. The case, too, of *Ex parte Pye v. Duport*, *supra*, and *McFarden v. Jenkins*, *supra*, and numerous other similar cases, seem to indicate that there should be no necessity that a valid contract or assignment at law should necessarily exist before equity furnishes its aid. These cases establishing that a court of equity will, in favor of a mere volunteer, enforce a simple declaration in writing, not under seal, by an owner of property, that it shall be held in trust for the objects of his bounty, we conclude, therefore, that a voluntary agreement, whether under seal or not, will be enforced by a court of equity in favor of a wife or child, or a defective conveyance or assignment, whether under seal or not, will be aided in favor of a wife or child, whether it be under seal or not; but the agreement or assignment should, distinctly, appear to be complete and definite; and this can only appear, with the requisite distinctness, by the formal delivery of the instrument in writing, expressing the agreement or assignment. Such an agreement or assignment should not be deduced from the letters of a parent to a child; much may be said in such letters that the parent might decline, if called upon

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to put in an instrument of writing, and formally deliver. If thus formally delivered, we may, we think, safely and justly dispense with the seal in all cases. We are the better satisfied with this conclusion, as modern courts of equity are paying less and less regard to mere formalities, and a seal in the United States is becoming more and more regarded as a mere formality. It has ceased to be the solemnity which it was, and much of its effect was due to its solemnity. In several of the States, all differences between sealed and unsealed instruments are abolished, and in all of them there is far less difference than the common law establishes. We could not adopt the language of Judge BALDWIN, in *Ortman v. Dixon*, 13 Cal. 36, and say, "The difference between instruments sealed and unsealed is, at least, at this day, a mere arbitrary and unmeaning distinction, made by technical law, unsustained by reason." But still we would not extend the cases in which the use of seals are required, beyond those cases in which they now are clearly required; and we are of the opinion, both on reason and authority, that a seal has not, clearly, been heretofore required to make such a paper as the plaintiffs present with their bill, in this case, effective in a court of equity, when its aid is invoked by a child.

[Omitting an immaterial question.]

The other judges concurred.

Decree affirmed.

 DOUGLASS V. TOWN OF HARRISVILLE.

(9 W. Va. 162.)

Taxation — injunction against collection of illegal tax.

Equity will not enjoin the collection of an illegal tax, in the absence of special circumstances, as for example to prevent multiplicity of suits, or irreparable injury, or cloud upon title.*

* *Youngblood v. Sexton* (32 Mich. 406), 20 Am. Rep. 654; *Levitt v. Spencer* (7 W. Va. 689), 23 Am. Rep. 619, and note, 623. In *City of Delphi v. Bowen*, 61 Ind. 23, it is said: "In those States where law and equity are administered separately, and by different modes of procedure, an injunction will not lie to prevent the collection of even a void tax, unless the case presents some peculiar ground for equity jurisdiction, as the prevention of a multiplicity of suits, or the removal of a cloud upon title, or where an action at law cannot afford an adequate remedy. But in this State where the distinction between actions at law and suits in equity and the forms of actions are abolished, the remedy by injunction, to restrain an action of an illegal and void tax, may be sought at once."

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BILL for injunction to restrain collection of a tax. 'The opinion states the facts.

Scott & Cole, for appellants.

Robert S. Blair, for appellees.

HAYMOND, President. This is a bill of injunction, filed in the Circuit Court of Ritchie county, against the defendants, to restrain the collection of a sum of money assessed by the town of Harrisville against the plaintiffs, being the costs of constructing a certain pavement or sidewalk, on the street, adjacent to a lot of plaintiffs, which pavement the plaintiffs had been previously ordered to make, and notified, that, unless they did so within a specified time, it would be done by the town at their costs. The bill alleges, in substance, that said assessment is, in fact, a tax, and that it is illegal and unconstitutional; that the assessment so made was placed in the hands of defendant, Bush, acting as town sergeant; that said Bush has levied said assessment on a buggy of plaintiffs, and has advertised the same for sale to pay the assessment, and that the said Bush is insolvent. The bill also claims that the town was, in fact, never legally incorporated, but it states and refers to the act of the legislature of the 26th day of February, 1869, which provides, "that the place in the county of Ritchie, known as the town of Harrisville, is thereby incorporated," subject to the provisions of chapter 47 of the Code of West Virginia. It also claims that all the provisions of said chapter 47 were never complied with, and that the town, therefore, never became incorporated; but it alleges that pretended elections have been held, at which the council and other officers were claimed to be elected, and that said officers are acting as council, sergeant, etc., in and for said town, the town, by its corporate name, and as a corporation, and said Bush, are made defendants to the bill, and the bill prays that the town of Harrisville and the said D. S. Bush, sergeant of said town, their attorneys, etc., and all persons acting under their authority, may be enjoined and inhibited from selling plaintiffs' property for the said tax or assessment, or from proceeding, in any manner, in collecting the same.

The bill was demurred to, and the demurrer overruled.

The defendants then each answered the bill. A considerable amount of evidence was taken and filed in the cause by plaintiffs

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and defendants, and, at the hearing, the court dissolved the injunction and dismissed the bill. From this action of the Circuit Court, the plaintiffs have obtained an appeal to this court.

[Omitting a minor question.]

I will proceed to ascertain whether the plaintiffs' case, as it appears, is one proper for the interposition of a court of equity, by injunction. A court of equity will not restrain the collection of an assessment or tax, imposed by an incorporated town, on the sole ground that the tax is illegal. There must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the assessment or tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the plaintiff, or the like. *Dows v. City of Chicago*, 11 Wall. 108; *Heywood v. The City of Buffalo*, 14 N. Y. 534; *Bull v. Read*, 13 Gratt. 78; Dill. on Mun. Corp., vol. 2, §§ 727 and 737, and note 1, second edition; High on Injunctions, § 71, and note 1; *Susquehanna Bank v. The Supervisors of Broome County*, 25 N. Y. 312; *Cook County v. The Chicago, Burlington and Quincy Railroad Company*, 35 Ill. 463. In the last-named case, the court said it had been unable to find any decision, in its previous adjudications, asserting a right to bring a bill to restrain the collection of a tax illegally assessed, without regard to special circumstances. It concludes an examination of its former decisions, by stating that, while it was considered settled that a court of equity would never entertain a bill to restrain the collection of a tax, except in cases where the tax was unauthorized by law, or where it was assessed upon property not subject to taxation, it had never held that jurisdiction would be taken in these excepted cases without special circumstances, showing that the collection of the tax would be likely to produce irreparable injury, or cause a multiplicity of suits. Equity generally has not jurisdiction where the party complaining has a plain and adequate remedy in a court of law. Except where the special circumstances present a case proper for the cognizance of a court of equity, the party of whom an illegal tax is collected has, ordinarily, ample remedy. In the case in judgment a "buggy," personal property has been levied on to make the assessment, which amounts to \$33.62. And it would seem that the personal property so taken is ample to pay the tax, at least it is presumptively. See *Henry v. Gregory*, 29 Mich. 68. It is true, it is alleged that Bush, the town sergeant, who made the levy, is

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insolvent but is not pretended that the town is not responsible and solvent, if the assessment is illegal. If the assessment was illegal the plaintiffs, protesting against its enforcement, might have had their action, after it was paid, against the officer or the town, to recover back the money, or they might have prosecuted either for their damages. No irreparable injury would have followed to them from its collection. Nor would they have been compelled to resort to a multiplicity of suits to determine their rights. *Dows v. City of Chicago*, 11 Wall. 112.

This court has heretofore considered principles bearing on this case, in cases from the *County of Greenbrier v. Boards of Education*, not yet reported, and following the case of *Bull v. Read*, 13 Gratt. 78, and the said case in 11 Wall. In the case of *Kuhn v. the Board of Education of Wellsburg*, 4 W. Va. 499, and the case of *The Trustees of Clarksburg v. Goff*, 5 id. 498, the question of jurisdiction was not raised or made, and was not decided by the court, just as has been the case in a number of other cases, where jurisdiction has been taken, as stated in the opinion of the court in the case cited in 11 Wall. In the case of *Tappan, Collector, v. Merchants' National Bank*, 19 Wall. 490, I presume special cause was shown for the interposition of a court of equity, as the question of jurisdiction was not raised or discussed.

This bill is filed in the name of plaintiffs alone, and not in behalf of any others. If the assessment is illegal, it, and all proceedings under it, are illegal and null, and the town, as well as the officer, is responsible to the plaintiff, for damages in a suit at law. They, plaintiffs, had also a remedy by detinue, under the provisions of chapter one hundred and two of the Code, by which they could have obtained immediate possession of the "buggy," or compelled the officer to give security for its delivery. If the said assessment was illegal, which I do not now determine, plaintiffs evidently had a complete and adequate remedy at law, for redress and relief, without invoking the aid of a court of equity, by the exercise of a process of injunction, and having such remedy, they do not present a proper case for the exercise of equity jurisdiction.

There was, therefore, no error in the Circuit Court dissolving the injunction, and dismissing plaintiffs' bill.

The said decree of the Circuit Court of the county of Ritchie, rendered in this cause on the 30th day of April, 1874, must be affirmed with costs to the appellees, and also \$30 damages.

Decree affirmed.

WHEELING, ETC., TRANSPORTATION CO. v. CITY OF WHEELING.

(9 W. Va. 170.)

Constitutional law — taxation of steamboats.

An annual tax in West Virginia, on the value of steamboats plying between West Virginia and Ohio, and owned and having their home port in the former State, is not in violation of the provisions of the Federal Constitution prohibiting the States from levying tonnage duty and securing to Congress the exclusive right to regulate inter-State commerce.*

TRESPASS on the case in assumpsit to recover taxes illegally collected. The taxes were assessed annually at Wheeling, West Virginia, on the value of steamboats, owned at that place and plying between that place and ports in the State of Ohio, and registered and licensed as coasting vessels under the laws of the United States. Defendant had judgment. The opinion states the other facts.

Henry M. Russell, for plaintiff in error.

George W. Jeffers and Caldwell & Caldwell, for appellee.

HAYMOND, President. [After stating the case.] It is now here claimed by the plaintiff that the court erred in its rulings and judgment in this:

First. The assessment of said taxes on said steamboats, for each of said years, and the collection thereof, was in violation of article one, section ten, paragraph three of the Constitution of the United States, which declares that "no State shall, without the consent of Congress, levy any duty of tonnage."

Second. That the assessment of said taxes for each of said years, and the collection thereof, was in violation of article one, section eight, paragraph three of said Constitution, which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

* This decision was affirmed by the Supreme Court of the United States in April, 1879. See 19 Alb. Law Jour. 338. See, also, *Am. Union Express Co. v. City of St. Louis*, ante, p. 332.

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The first, and chief question, to be determined in this cause is, whether the assessment of the taxes upon the value of said steamboats against the plaintiff, and the collection of the taxes from the plaintiff, is prohibited by said two paragraphs of the Constitution of the United States above quoted.

It is conceded, in argument, that the council of the city may levy and collect taxes annually for the use of the city, on personal property in the city, subject to certain limitations as to the amount of such tax, not necessary to specify here; that the personal property which may be taxed includes all subjects of taxation which the assessors, acting under the laws of the State, are, or shall be, by law, required to enter on their personal property books for the purpose of taxation. This seems to be the law, whether so admitted by the counsel or not. The steamboats in question are certainly personal property, and subject to taxation according to their value, as other property by the State, for State purposes, and by the city for its use, unless they are exempt from such taxation by some constitutional provision or statutory law. The property upon which said taxes were levied and collected was the steamboats aforesaid, and no other property. Whether the steamboats aforesaid under the facts and circumstances stated in the facts as agreed before the Circuit Court are subject to taxation by the State or city as property, in the manner the taxes involved in this case were assessed, though never determined by the Supreme Court of this State, is not new to the Supreme Court of the United States, and the highest judicial tribunals of some of the other States of the Union. The question has been maturely considered and pronounced upon by some of the best judicial minds of the nation. In what are known as the *Passenger Cases*, commencing on page 287 of the 7th volume of Howard's Reports, Judge McLEAN says, on page 402: "A State cannot regulate foreign commerce, but it may do many things which, more or less, affect it. It may tax a ship, or other vessel, used in commerce, the same as other property, owned by its citizens. A State may tax the stages in which the mail is transported; but this does not regulate the conveyance of the mail, any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property, in some degree, affects its use." Were the steamboats a part of the personal property within the State, and a part of the personal property in the city as belonging to plaintiff? In the case of *Hays v. The Pacific*

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Mail Steamship Co., 17 How. 597, NELSON, J., on page 599, says: "Whether the vessel leaving her home port for trade and commerce visits, in the course of her voyage or business, several ports, or confines her operation in the carrying trade to one, are questions that will depend upon the profitable returns of the business, and will furnish no more evidence that she has become a part of the personal property within the State, and liable to taxation at one port, than the others. She is within the jurisdiction of all, or any one of them, temporarily, and for a purpose wholly excluding the idea of permanently abiding in the State, or changing her home port. Our merchant vessels are not unfrequently absent, for years, in the foreign carrying trade and unlading it from port to port, during all the time absent; but they neither lose their national character or their home port." Wheeling was the home port of the steamboats of plaintiff. Plaintiff was, when the taxes were levied and collected, a corporation incorporated and organized under the laws of West Virginia, and plaintiff's chief office was at Wheeling, and its officers resided there. In the cases of *Cox v. The Collector*, and *Trade Company v. Same*, 12 Wall. 204, according to the syllabus, it was decided by the Supreme Court of the United States:

"1. Although taxes levied, as on *property*, by a State upon vessels owned by its citizens, and based on a valuation of the same, are not prohibited by the Federal Constitution, yet taxes cannot be imposed on them by the State, at so much per ton of the registered tonnage. Such taxes are within the prohibition of the Constitution, 'that no State shall, without the consent of Congress, lay any duty of tonnage.' " In the cases last cited, CLIFFORD, J., who delivered the opinion of the court, which seems to have been unanimous, says, commencing on page 212: "Power to tax, with certain exceptions, resides with the States independent of the Federal government, and the power, when confined within its true limits, may be exercised without restraint from any Federal authority. They cannot, however, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as, without the consent of Congress, they are unconditionally prohibited from exercising any such power. Outside of these prohibitions, the power of the State to tax extends to all objects within the sovereign power of the States, except

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the means and instruments of the Federal government. But ships and vessels owned by individuals, and belonging to the commercial marine, are regarded as the private property of their owners, and not as the instruments or means of the Federal government, and, as such, *when viewed as property, they are plainly within the taxing power of the States, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution.* Argument, therefore, to show that they may be taxed as other property belonging to citizens of the State, is hardly necessary, as the opposite theory is indefensible in principle, contrary to the general received opinion, and is wholly unsupported by any judicial determination. Direct adjudications to support that proposition are not to be found in the reported decisions of this court; but there are several cases which concede that such a tax, if levied by a State, would be legal, and no doubt is entertained that the concession is properly made." *Nathan v. Louisiana*, 8 How. 82; *Howell v. Maryland*, 3 Gill, 14. Taxes levied by a State upon ships and vessels, owned by the citizens of the State *as properly based on a valuation of the same*, are not within the prohibition of the Constitution; but it is equally clear and undeniable that taxes levied by a State upon ships and vessels, as instruments of commerce and navigation, are within that clause of the instrument, which prohibits the States from levying *any duty* of tonnage, without the consent of Congress. Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question. *State T. Tax Cas.*, 12 Wall. 213 and 214.

In the case of *Morgan v. Parham*, 16 Wall. 471, which was decided December, 1872, according to the syllabus, it was decided:

"1. When a vessel is regularly registered in the port to which it belongs, that is to say, 'in the port nearest to which her owner, husband, or acting and managing owner usually resides,' [registered, *ex. gr.*, at New York,] the fact that she may be temporarily in a port of a State [as *ex. gr.*, Mobile, in Alabama,] other than that where her home port is, and engaged in lawful commerce—one of the daily line of steamers—between that port and the port of a yet third State [as *ex. gr.*, New Orleans, in Louisiana], does not cause her to become incorporated into the personal property of the State of Alabama, and no State but that in which her home port is has dominion over her for the purpose of taxation.

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2. The fact that the vessel was enrolled by her master as a coaster at Mobile, Alabama, and that her license as a coaster was renewed from year to year, does not affect her registry in New York, or her ownership there. It accordingly does not change the rule."

In the case last cited, HUNT, J., who delivered the opinion of the court, says, commencing on page 474: "The fact that the vessel was physically within the limits of the city of Mobile, at the time the tax was levied, does not decide the question. Thus, if a traveller on that day had been passing through that city, in his private carriage, or an emigrant with his worldly goods on a wagon, it is not contended that the property of either these persons would be subject to taxation within the city. It is conceded by the respective counsel, that it would not have been. On the other hand, this vessel, although a vehicle of commerce, was not exempt from taxation on that score. A steamboat, or a post coach, engaged in local business within a State, may be subject to local taxation, although it carry the mail of the United States. The commerce between the States may not be interfered with by taxation or other interruption, but its instruments and vehicles may be. *Gibbons v. Ogden*, 9 Wheat. 1; *Passenger Cases*, 7 How. 283. It is not, therefore, upon this principle that we are to decide the case. Nor does it fall within that range of cases of which *The Steamship Co. v. The Port Wardens*, 6 Wall. 31, and *Gibbons v. Ogden*, furnish illustrations.

In each of those cases the taxation was upon a subject directly connected with the navigation of the public waters, and with the commerce of the country. In the first case, a statute had been passed requiring every vessel entering the harbor of New Orleans to pay five dollars to the port wardens, in addition to other fees, whether any service were performed or not. In the second case vessels navigating the waters of the Hudson river were required to take a license for that purpose from the State of New York. The imposition in this class of cases, was a tax upon the use of the public waters of the country, and tended immediately to interfere with, and to obstruct the commerce between the States. In the instance before us, the tax was upon a vessel at the wharf. It was in this respect, as if a tax had been laid upon lumber or cotton lying on the dock at Mobile. This vessel was owned by, and employed in the service of a resident of the State of New York. It was primarily and presumptively taxable under the authority of that State, and that State only. It is urged that her status, or condi-

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tion, was affected by what was done, or neglected, in regard to her register and enrollment. In *Blanchard v. Martha Washington*, the law on this subject is thus explained: "Ships or vessels are required to be registered by the collector of the district in which shall be comprehended the port to which the same shall belong at the time of the registry, which port shall be claimed to be at, or nearest to which the owner, if there be one, or if more than one, the husband and acting manager resides. * * * There was nothing, therefore, in her enrollment in the port of Mobile, that affected her registry in New York, or her ownership in that place, or that tended to subject her to the taxation of the State of Alabama, under the circumstances stated. It is the opinion of the court that the State of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of that State, but was there temporarily, and that it was engaged in lawful commerce between the States, with its *situs* at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value. The case of *Hays v. The Pacific Mail Steamship Co.*, 17 How. 596, is decisive of the case before us."

In addition to the decisions of the Supreme Court of the United States which I have cited, there have been decisions by some of the State courts, of great weight, as authority upon the question involved here. See *Perry v. Torrence*, 8 Ohio, 521; *Howell v. The State*, 3 Gill, 14; *Battle v. Corporation of Mobile*, 9 Ala. 234; *Lott, Tax Collector, v. Mobile Trade Co.*, 43 id. 578. See, also, opinion of Judge JOYNES, *Johnson v. Drummond*, 20 Gratt. 424-425. In the case in 8 Ohio, 521, it was decided that "a State law, including steamboats as a portion of the property subject to taxation, is not unconstitutional." In this case the court, in its opinion at the conclusion, says: "The conclusion, on the whole, is that the tax complained of does not interfere with the power of Congress to regulate commerce; nor can it be regarded as a tonnage duty, because that is a tax which is levied upon the vessel as an instrument of navigation, and without reference to the place where she is owned."

It will be seen, on examination of the case of *Perry v. Torrence*, that the principle determined in that case fully determines that the levying and collecting the taxes involved in this case, was, and is not prohibited by the Constitution of the United States.

In the case under consideration, the plaintiff is a West Virginia

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corporation; all its officers reside at the city of Wheeling, and its (plaintiff's) chief office was also at said city during all the time for which said taxes were levied and collected. The city was also the home port of the steamboats taxed, and the steamboats became incorporated into the property of the city, and were justly and properly liable to be taxed according to their value, as any other property in the city. The taxes assessed and collected upon said steamboats, according to their value as property, as was done in this case, were legally and properly assessed and collected by the city, under the laws of this State; and the assessing and collecting the same is not prohibited by the Constitution of the United States.

Upon the whole, it seems to me that the finding and judgment of the municipal court of Wheeling, upon the facts agreed in this case, were right and proper, and not erroneous.

For the foregoing reasons, the judgment of the said municipal court of Wheeling, rendered in this cause on the 17th day of November, 1875, is affirmed by this court, with costs and \$30 damages.

MOORE and GREEN, JJ., concurred.

EDMISTON, J., absent.

Judgment affirmed.

 McCALL V. PHOENIX MUTUAL LIFE INS. CO.

(9 W. Va. 257.)

Life insurance — application — mistake of agent — recovery by insurer of premiums paid on lapsed policy.

An applicant for life insurance, having correctly stated the date of his birth to the agent, is not prejudiced by the agent's mistake in writing the same in the application.*

If a life insurance company wrongfully refuses to accept a premium and determines the policy, the insured may treat the policy as determined, and recover all the premiums he has paid. (*See note, p. 561.*)

ACTION to recover insurance premiums. The opinion states the facts.

* See *Commercial Ins. Co. v. Spankneble* (52 Ill. 53), 4 Am. Rep. 562.

Taylor & Barr, for plaintiff in error.

John E. McKennan, for defendant in error.

HAYMOND, President. This is an action of trespass in the case in assumpsit, brought in the municipal court of Wheeling, by the plaintiff against the defendant, to recover \$495.85, money paid to defendant by plaintiff, as first premium on policy No. 78355, on the life of plaintiff. After the suit was brought, and on the 20th day of November, 1875, the defendant, appeared to the action and plead non-assumpsit, on which plea issue was regularly joined. Afterward, a trial by jury was had in the cause, on the issue joined, and the jury found a verdict in favor of the plaintiff for \$564.12 damages. Whereupon the defendant, by its attorney, moved the court to set aside the verdict and grant a new trial, but the court afterward overruled said motion, and rendered judgment against the defendant, upon the verdict of the jury, with interest, and also for costs. To the opinion of the court, in refusing a new trial, the defendant excepted and filed his bill of exceptions, which was duly signed.

[Omitting statement of facts immaterial to the point.]

The case has been brought before us by *supersedeas*, and the only question for us to determine is, did the court err in refusing to grant the defendant a new trial? Without entering into a full analysis of the facts or evidence in this cause, it seems to me, on examination of the same, that the jury might well have inferred, from the facts and evidence, that the plaintiff made no substantial mistake in giving his age to the agent, Tift, at the time he signed the application. True, he said to Tift that he was 65 years old, but he then and there told him, he was born the 10th of July, 1807, and that he could, from that, ascertain his age. And it is clear that the agent, Tift, did, at the time plaintiff signed the application, understand that plaintiff was born the 10th of July, 1807; at least the jury were justified in so considering. It further appears that, after said agent, Tift, had inserted in the application 1807 as the year of plaintiff's birth, he changed it to 1808, and I think it otherwise sufficiently appears that said agent, Tift, knew when he inserted the age in the application of plaintiff at 65 years, that he was, in fact, 66 years old; at least the jury was justified in so considering. The insertion of the birth of plaintiff in said

policy, by said agent, Tift, as being in the year 1808, was evidently done without authority from the plaintiff, and without his knowledge or consent. It was done by said agent for some purpose. It was certainly the *fault*, or negligence, of said agent; but it does not appear to me, from the evidence, that it was a mere innocent mistake. An insurance agent, acting within the scope of his authority, binds his principal in making the survey and filling up the application; and if the applicant truly represents the facts, and, by the fault or negligence of the agent, the application contains a material misstatement, the company are estopped to take advantage of it. *Flanders on Fire Ins.* 180-181; *Simmons v. Ins. Co.*, 8 W. Va. 474, and cases there cited: "Knowledge by the agent, with whom the agreement to insure is made, and who takes and fills out the application, of the existence of incumbrances upon the title, or of prior insurance, is knowledge on the part of the insurer. He is chargeable with knowledge of all the facts stated by the applicant for insurance to the agent; and he, having truly stated to the agent the real condition of the property, cannot be held to have made any misstatement, or practiced any concealment toward the insurer, although the written application, as drawn up by the agent, does not correspond with the verbal statement made by the assured to the agent." *Flanders on Fire Ins.* 303-4; *Simmons v. Ins. Co.*, *supra*. So it seems to me, upon principle and authority, that a life insurance company is chargeable with knowledge of all the facts stated by the applicant for insurance to the agent as to the time of his birth; and he, having truly stated to the agent the time of his birth, cannot be held to have made a misstatement toward the insurer, although the written application, as drawn up by the agent, does not correspond with the verbal statement made by the assured to the agent. Under this view, the policy, under the circumstances, was binding upon the defendant.

The agents of the company, at the end of the year, when plaintiff desired a renewal, and paid to the agent his money therefor for the next year, obtained from the plaintiff his policy, by expressing to him their opinion that the defendant ought to, and, likely, would, continue to carry the risk or refund the premium. And when defendant thus, through his agents, procured said policy, it refused to further carry the risk, and retained the policy from plaintiff, and lapsed it on its books, and refused to return the premium paid. This conduct on the part of the defendant, it

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seems to me, was wrongful and unjust. The company, it seems to me, under the circumstances of this case, should have received the premium tendered by the plaintiff, at the end of the first year, and if it declined to do this, certainly it ought to have returned the premium paid for the first year. In *McKee v. Phoenix Insurance Company*, 28 Mo. 383, it was held that "should an insurance company wrongfully refuse to receive premiums due on a life policy, the assured may treat the policy as at an end, and may recover back the premium paid under it." I would remark here that defendant failed to give the policy in evidence, and I, therefore, cannot determine what powers the company had, under its provisions, as to lapsing or annulling the policy. This policy was in the possession of the defendant, and if it desired the benefit of any of its provisions authorizing the lapsing or annulling of the policy, it should have produced it.

Upon the whole, it seems to me that the defendant wrongfully determined the contract of insurance, by refusing to receive a premium when it was due, at the end of the first year, for the second year, and lapsed the policy issued, and that upon the defendant so doing the plaintiff had the right to treat the policy as at an end, and to recover all the money he had paid under it. Courts are not ordinarily authorized to set aside the verdict of a jury, except where it is clearly against the law and evidence. And I confess that I am unable to ascertain or determine that the verdict of the jury in this case is clearly contrary to the law and evidence.

For these reasons the judgment of the municipal court of Wheeling, rendered in this cause, must be affirmed, with costs and damages to defendant in error, according to law.

The other judges concurred.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Day v. Connecticut General Life Ins. Co.*, 19 Alb. Law Jour. 185, the Supreme Court of Connecticut held that where a life insurance company refused to accept the annual premium on a policy theretofore issued and declared such policy void and determined because of the acts of the insured, an action would not lie to recover the sum insured or the premiums paid upon an implied undertaking to receive the premiums and keep the policy in force; and that where an insurance company refuses to receive premiums and to recognize a life policy as in force, *semble* that the insured has two remedies: (1) to elect to consider the policy at an end and sue for the equitable value thereof; (2) to bring a suit to have the policy adjudged to be in force; and perhaps a third remedy, to tender the premiums and test the forfeiture in an action on the policy where by its terms it becomes payable.

HULING v. CABELL.

(9 W. Va. 522.)

Assignment of prospective profits — rights of prior judgment creditor.

An agricultural society assigned for the benefit of their creditors the proceeds of a fair about to take place on their grounds. *Held*, that such assignment was void as against the lien of an execution issuing before the payment of such proceeds to the creditors.

PROCEEDING'S to determine conflicting rights to moneys.

W. H. Hogeman, for plaintiff in error.

George S. Couch and *William A. Quarrier*, for defendants in error.

GREEN, J. [After stating the facts.] The principal question in controversy is, whether the resolution, passed by the West Virginia State Agricultural Society, on September 26, 1874, operated as an assignment in law, or equity, of the proceeds arising from the agricultural fair held several days afterward, on their fair ground, and under their direction. It cannot, of course, so operate, unless the proceeds of a fair, to be held at a future time, are capable of assignment. The authorities have, I think, settled that neither *choses in action* nor property can be assigned, unless they have either actual or potential existence at the time of the assignment. Property has been said to have a potential existence, when it is the natural product or expected increase of something belonging to the vendor at the time of the assignment or sale. It has been contended that non-existing property may be the subject of assignment, but most of the decisions, relied upon to establish this proposition, are, when properly understood, consistent with the law as I have above stated it. Thus in *Gardner v. Hoeg*, 18 Pick. 168, and in *Tripp v. Brownell*, 12 Cush. 376, it was held that "the *lay*, that is the share of the oil, which a sailor in a whaling ship receives in lieu of wages, may be assigned before the commencement of the voyage." But this ought not to be regarded as a sale of the oil, but rather as an assignment by the sailor of his claim against the owner of the ship for his share of the oil which may arise from the intended voyage. As this claim has an actual

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existence at the time of the assignment, there is no violation of correct principles in holding that it is assignable. So in *Brckett v. Blake*, 7 Metc. 335, it was held a city officer chosen for a year, subject to removal at any time, at the will of the mayor and aldermen, and whose salary is payable quarterly, may legally make an assignment of a quarter's salary before the quarter expires. In *Clarke v. Adair*, cited in 4 Durnford and East, 343, an officer drew a bill on the agent of a regiment, payable out of the first money which should become due to him, on account of arrears or non-effective money, Lord MANSFIELD held that this was a good assignment.

But in these cases, it should be observed that the officers, holding their respective offices at the time of the assignment, had then existing claims to what they assigned, and though these claims were uncertain in amount, or voidable at the pleasure of a third party, still, they were assignable. It has been, in like manner, held that a laborer for a manufacturing company, or other employer, may assign his future wages, even though his hiring be only by the day, and he be liable to be dismissed at any time, or though he works by the piece, and his wages per month vary. *Emery v. Lawrence and Trustees*, 8 Cush. 151; *Hartley v. Tapley*, 2 Gray, 565; *Lannan v. Smith*, 7 id. 150. But in all these cases, there were existing engagements when the assignment was made, and though these engagements might be avoided or terminated at any time, or the measure of the wages was uncertain, still as the future wages arose out of existing contracts, they were regarded as having a potential existence.

A question has often been discussed, whether a crop of grain not yet sown may be sold or assigned by the owner of the land.

The weight of authority seems to be that such grain, having no actual or potential existence, cannot be assigned. *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711; *Comstock v. Scales*, 7 Wis. 159; *Milliman v. Neher*, 20 Barb. 38; *Bank of Lansingburg v. Crary*, 1 Barb. 542.* These decisions seem based upon the same principles that are laid down in *Low v. Pew*, 108 Mass. 347; 11 Am. Rep. 357. In that case, the owners of the schooner which was about to sail on a fishing voyage, made a written agreement

* See, *contra*, *Argues v. Wasson* (51 Cal. 620), 21 Am. Rep. 718; *Everman v. Robb* (58 Miss. 663), 24 Am. Rep. 633. See *McCaffrey v. Woodin* (35 N. Y. 450), 23 Am. Rep. 644, and note, 663.

with a party, whereby they sold, assigned, and set over to him, all the halibut that might be caught during the voyage, at 5½ cts. per pound, the purchaser paying in cash \$1,500, when the assignment was made. The court held this assignment void, the halibut having no actual or potential existence when the assignment was made. The same principle was followed in *Mulhall v. Quinn*, 1 Gray, 105. In this case a laborer assigned all the claims he had, or might have, against the city of Boston, for all sums of money due, or to become due, for services in laying common sewers for six months thereafter. It appeared that the laborer had been, previous to the making of this assignment, employed by the city for particular jobs in laying common sewers, and that afterward, during the six months, he was employed by the city for a like particular job at the same price, but when he made the assignment he was under no contract with the city, it was held that the assignment was void. The court say, "that the future earnings constituted a mere possibility, coupled with no interest; that none of the cases go so far as to hold that the mere possibility of being employed by the city, and earning wages under that employment at a future time, is capable of being assigned." *Morton, J.*, in *Lou v. Pew*, 108 Mass. 349, thus lays down the law. "It is an elementary principle of the law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held, that a mortgage of goods, which the mortgagor does not own at the time the mortgage is made, though he afterward acquire them, is void. *Jones v. Richardson*, 10 Metc. 481. The same principle as to all sales of personal property is applicable. *Rice v. Stone*, 1 Allen, 566, and cases cited. *Head v. Goodwin*, 37 Me. 181.

It is equally well settled that it is sufficient, if the seller has a potential interest in a thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the things sold, when it shall come into existence, is a present vested right, and the sale is valid. Thus a man may sell wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own

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land, but not upon land in which he has no interest. 2 Kent's Com. (10th ed.) 468, (641) note a; *Jones v. Richardson*, 10 Metc. 481; *Bellows v. Wells*, 36 Vt. 599; *Van Hooker v. Cory*, 34 Barb. 9; *Grantham v. Hawley*, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In *Mulhall v. Quinn*, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In *Hartley v. Tupley*, 2 Gray, 565, it was held, that if a person be under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former, the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at the bar, the sellers, at the time of sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish, and that the sale to the plaintiffs was void."

Applying these principles to the present case, was there any potential interest owned by the West Virginia Agricultural Society, when they made the assignment, in the proceeds which they expected to arise from the Agricultural Fair, to be held in a few days thereafter? It seems to me clearly not. It is true they owned the grounds, upon which they expected to hold the fair, out of which they expected these proceeds to arise, and had advertised holding of the fair in a few days; but in the case just cited, the assignor owned a schooner, which, when the assignment was made, was just about to start on a fishing voyage, in which he expected to catch halibut. The expected proceeds of this Agricultural Fair were no more assignable than were the expected proceeds of the laborer, who, when the assignment was made, anticipated that he would be employed to work on the Boston sewers, as he had been before. His expectation was probably as well founded as that of the West Virginia State Agricultural Society. But he had, when he made this assignment, no existing contract with any one out of which these expected wages might arise, and so here the West Virginia State Agricultural Society had no agree-

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ment with any one out of which the proceeds they undertook to assign, might arise. It was a mere expectancy, based on no existing contract, and was, therefore, not assignable.

The question has been discussed whether these resolutions of the board of directors amounted to an assignment, and whether this attempted assignment was not fraudulent, and, whether to be valid, it ought not to have been recorded. I do not deem it necessary to consider these questions, as I hold that the proceeds of the fair was incapable of assignment, before the fair was held.

[Omitting statutory considerations.]

The other judges concurred.

Judgment reversed.

 STOCKTON v. FARSEY.

(10 W. Va. 171.)

Married woman — liability to suit.

Under a statute permitting married women to take, hold and convey property as if unmarried, a married woman cannot be sued on a contract made by her while married and living with her husband.

ACTION of debt; plea of coverture; demurrer; demurrer sustained. The opinion states the facts.

W. Mollohan and J. M. Payne, for plaintiff in error.

W. H. Hogeman, for defendant in error, cited Code W. Va., ch. 131, § 7; 5 Rob. Pr. 50; *Buck v. Fouches*, 1 Leigh, 64; 1 Chitty's Pl. 434; Gould's Pl., ch. 5, §§ 85, 88; Code W. Va., ch. 125, § 16; Gould's Pl., ch. 3, §§ 59, 57; 1 Chitty's Pl. 444; *Hortons & Hutton v. Townes*, 6 Leigh, 58; Gould's Pl., ch. 5, §§ 143, 147; 1 Chitty's Pl. 456, 412, 449; Code W. Va., ch. 125, § 29; 2 Chitty's Pl. 454-5; *Tilman v. Shackleton*, 15 Mich. 456; *Campbell v. White*, 22 id. 185; *Frecking v. Rolland*, 53 N. Y. 422; *Hier v. Staples*, 51 id. 138; *Westgate v. Munroe*, 100 Mass. 227; *Fiske v. McIntosh*, 101 id. 66; *Labaree v. Colby*, 99 id. 560; *Eastabrook v. Earle*, 97 id. 302; *Ames v. Foster*, 3 Allen, 541; *Cookson v. Toole*, 59 Ill. 515; *Rodemeyer v. Rodman*, 5 Iowa, 427; *Craft v. Rolland*, 37 Conn. 498; *Mitchell v. Smith*, 32 Iowa, 484; *Quassaic Nat. Bk. v. Waddell*, 8 N. Y. Sup. Ct. 125.

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GREEN, President. [After stating the case.] The first question is whether this plea is a bar to the action or whether it should have been plead in abatement only. It is in the form of a plea in bar, and if it could only have been plead in abatement the plea is fatally defective. By the common law a woman could not be sued upon a contract made by her during her coverture whether joined with her husband or not. *Edwards v. Davis*, 16 Johns. 286. The contract of a married woman at common law was absolutely void, and no action upon such contract would lie against her. *Griffin and Wife v. Reynolds*, 17 How. 611. It follows then that a plea that the contract was made by the defendant while she was under coverture must be plead in bar of the action, because, if true, it destroys all right of action at law upon the contract, but if she entered into the contract while sole, and subsequently married, she must plead this in abatement and not in bar, because her defense does not deny any liability, but she simply objects that her husband should be made a joint defendant with her. See 1 Chitty's Pl. 465, and *Steer v. Steer*, 14 Serg. & R. 379. If then the common law remains unchanged by statute, this plea of coverture alleging that the note was executed during coverture was properly plead in bar; has there been such change. The third section of chapter sixty-six of Code of West Virginia, provides, "any married woman may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, issues and profits thereof, in the same manner, and with like effect as if she were unmarried and the same shall not be subject to the disposal of her husband, nor be liable for his debts." So much of our statute as is copied above is taken *verbatim* from the New York statute of 1848-49.

Under the statute the New York courts hold that a married woman could acquire and hold in actual possession and enjoyment a separate legal estate in lands or personal property. Before the passage of this statute a married woman's separate estate was never a legal estate, but was purely equitable. In the case of *Cookson v. Toole*, 59 Ill. 515, it was held, under an Illinois statute, which, so far as I can judge from what is stated in the report of the case, was similar to the provisions of our law above quoted, that an estate derived under it was a legal, and no longer a mere equitable estate, from which the

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court concludes that as the estate is thus transformed from an equitable to a legal estate, all the rights incident to it must be legal rights, and as she could not hold and enjoy separate real estate as an unmarried woman without the right to contract for servants and laborers to cultivate her land, such implication, to so contract, is a legal implication arising under the statute. This capacity to so contract is a legal capacity, and therefore cognizable by a court of law. Reasoning thus, the court held that in actions of assumpsit brought for work and labor, to which the defendant put in a plea of coverture, the plaintiff might reply that the work and labor was done upon her farm, which was her sole and separate property. But the New York courts, in construing their statutes, of which so much of ours as is given above is a copy, held that it was plain that this statute did not remove the incapacity which prevents a married woman from contracting debts, and "that her promissory note or other personal engagement is still void, as it always was by the rules of common law. While her incapacity to contract debts still remained, the courts held she could charge this legal separate estate created by the statute, with liabilities just as she could formerly have charged her separate equitable estate. See *Yale v. Dederer*, 18 N. Y. 265; *Owens v. Dickenson*, 1 Craig's Phil. 48; *Barnett v. Lichenstein*, 39 Barb. 194; *Draper v. Stouevenel*, 35 N. Y. 507; *Ogden v. Blydenburgh*, 1 Hilt. 182; *Ballou v. Dillaye*, 37 N. Y. 35. The reasoning on which the New York courts based their decisions, seems to me far more satisfactory than the reasoning of the Illinois court; and as the legislature of West Virginia adopted the New York statute as far as above quoted, *verbatim*, long after the New York courts decided that it did not remove the legal disability of a married woman to make any contract personally binding upon her, we feel constrained to hold that our statute has no such effect. The twelfth section of chapter sixty-six of the Code of West Virginia, which is not copied from the New York laws, which provides that a married woman may be sued without joining her husband, where the action concerns her separate estate, may be supposed to have some bearing on the question under discussion; but it seems to me this section, or at least this portion of it, should be construed as in no manner affecting her liability but only as regulating the parties to the suit. If without this provision, she and her husband would be made defendants in a chancery suit to

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subject her separate estate, she alone, by virtue of this provision, may be made a defendant in such chancery suit. It is true that it is now held in the New York courts that a married woman may be sued at law upon certain contracts made by her while married, and that suit may be brought in the ordinary form, taking no notice of her marriage, and that if the contract sued on should be one she is not authorized to make, the objection should be made by her plea. *Freching v. Rolland*, 53 N. Y. 422; *The Corn Exchange Insurance Co. v. Babcock*, 42 id. 613; 1 Am. Rep. 601. But these decisions are based on statutes passed in 1860 and 1862. These acts are: "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business and perform any labor or service on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or service, shall be her sole and separate property, and may be used and invested by her in her own name."

Any married woman may, while married, sue and be sued in all matters having relation to her sole separate property, or which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person, in the same manner as if she were sole; and any married woman may bring and maintain an action in her own name for damages against any person or body corporate, for any injury to her person, or character, the same as if she were sole, and the money received on the settlement of any such action or recovered upon a judgment, shall be her sole and separate property. In case it shall be necessary, in the prosecution or defense of any action brought by or against a married woman, to enter into any bond or undertaking, such bond or undertaking may be executed by such married woman, with the same effect in all respects as if she were sole; and in case the said bond or undertaking shall become broken or forfeited, the same may be enforced against her separate estate.

"No bargain or contract made by any married woman in respect to her sole and separate property, or any property which may hereafter come to her by descent, devise, bequest, purchase, or the gift or grant of any person (except her husband), and no bargain or contract entered into by any married woman in or about the carrying on of any trade or business, under any statute of this State, shall be binding upon her husband, or render him or his property in any way liable therefor. In an action brought or defended by

any married woman in her name, her husband shall not, neither shall his property, be liable for the cost thereof, or the recovery therein. In an action brought by her for an injury to her person, character or property, if a judgment shall pass against her for costs, the court in which the action is pending shall have jurisdiction to enforce payment of said judgment out of her separate estate, though the sum recovered be less than one hundred dollars."

"A married woman may sue in any of the courts of this State, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she were sole."

Under these statutes the New York courts have held that in certain cases a married woman may be sued alone on her contract in a common law court. But neither these nor any similar acts have been enacted in this State.

Numerous cases have been cited in other States where common-law suits on contracts have been sustained against married women, but on examining these cases I find that they were based on statute laws, which are not so stated in the reports as to throw any light on the inquiry before us. It may be possible that a married woman living separate and apart from her husband might be sued on her contract in this State in a common-law court as an incident to the authority conferred on her by the thirteenth section of chapter sixty-six of the Code of West Virginia, page four hundred and forty-nine, to carry on in her own name any trade or business for her sole and separate use. But it is unnecessary in this case to express any opinion on this point. I think it is certain that in no other case could she be sued in this State in a common-law court upon a contract, though she may bring an action to recover her private property, she being now the legal owner thereof, and perhaps in some other cases to enforce her rights in relation to her private property, even when based on contracts. If, when this case is remanded, the plaintiff thinks that the character of his claim has so arisen out of the business carried on by the defendant, while living separate and apart from her husband, as to entitle him to bring this action, he may offer to reply to these facts and the court will then determine whether they constitute a good replication. Such was the mode pursued in Illinois in the case before cited, in which the plaintiff brought forward his right to sue the defendant on that particular contract, and if any such case can exist in this State.

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that is the proper mode of its being presented. Certain it is that in this State the general disability of a married woman to incur, by contract, a personal obligation on which she could be sued at law, has not been removed, and therefore she may rely on her plea of coverture as a bar to any action on a contract made by her while married; and if there be any exception to her disability to incur such personal responsibility, the plaintiff, by replication, should bring it to the attention of the court. The judgment of the Circuit Court in sustaining the demurrer to the plea filed, and in striking out the plea, and also the judgment rendered by the Circuit Court in favor of the plaintiff against the defendant, must be reversed and annulled, and the appellant must recover of the appellee his costs in this court expended, and the cause must be remanded to the Circuit Court to be proceeded with on the principles expressed in this opinion and further according to law.

Judgment reversed and cause remanded.

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(10 W. Va. 470.)

Negotiable paper — indorsement by stranger — evidence to define his liability.

When A indorses a note payable to the order of B, at the time it is made, he is *prima facie* liable to B as guarantor or maker, as B may elect; but he may show by extrinsic evidence that his intention was to bind himself only as guarantor or as second indorser, and thus limit his liability. (*See note, p. 580.*)

ACTION on notes by Lee to the order of Burton and indorsed by Hansford. Demurrer, and judgment for plaintiff. The opinion states the facts.

William H. Hogeman and C. E. Doddridge, for plaintiff in error, cited 4 Rob. Pr. 548; Bishop v. Hayward, 4 T. R. 471; Story on Prom. Notes, § 480; Bacon v. Burnham, 37 N. Y. 614; Hall v. Newcomb, 7 Hill, 416; 2 Rob. Pr. 231; Spies v. Gilmour, 1 Comst. 221, 231; Herrick v. Carman, 12 Johns. 160; Tillman v. Wheeler, 17 id. 328; Fegenbush v. Lang, 28 Penn. St. 194; Farmers' Bank et al. v. Vanmeter, 4 Rand. 553; Chalmers, Jones & Co. v. McMurdo,

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5 Munf. 252; *Hogue v. Davis*, 8 Gratt. 4; *Bank of the United States v. Beirne*, 1 id. 265; 2 Tuck. Com. 99; 1 Bouv. L. D. 136; *Bender v. Manning*, 2 N. H. 289; *Hardin*, 225; 2 Bouv. L. D. 417; *Syme v. Griffin*, 4 H. & M. 277; *Quarles v. Lacy*, 4 Munf. 260; *Cooke v. Simms*, 2 Call, 39; *Wooddy v. Flournoy*, 6 Munf. 506; 2 Chitty's Pl. 115; 1 id. 293-4; *Edw. on Bills*, 273-4, 610; *Foot v. Sabin*, 19 Johns. 159; *Spies v. Gilmour*, 1 Comst. 321; *Pitts v. Congdon*, 2 id. 352; 7 Hill, 416, 426; *Parker v. Carter*, 4 Munf. 279; *Early v. Preston*, 1 Patt. & H. (Va.) 228; *Freeman on Judg't*, §§ 231, 232, 235; *Coolidge v. Payson*, 2 Am. L. Cas. 323; *Peasley v. Boatwright*, 2 Leigh, 195; *Green v. Buckner*, 7 id. 83; *Ellis v. Brown*, 6 Barb. 293.

W. Molohan and James M. Laidley, for defendants in error.

GREEN, President. [After stating the case and considering a question of pleading.] The next inquiry is, whether the plaintiffs' declaration is sustained by the facts proven in the case. They were: The plaintiffs' agent was at the store of the defendant, in Kanawha county, West Virginia, to collect a debt he owed the plaintiffs, resident of the State of Ohio; Lee wanted an extension of time; the plaintiffs' agent agreed to give it, if Lee would give him notes for the debt, indorsed in such a manner that the plaintiffs could have them discounted in one of the local banks of Kanawha, if the plaintiffs wished so to do; and thereupon the plaintiffs' agent drew the two notes above copied, and Lee signed them and sent them by a clerk to the defendant, Hansford, with the request that he would indorse them, informing Hansford that if he would indorse them the plaintiffs would take them and give him (Lee) an extension of time on his debt. Hansford indorsed the notes and sent them back by Lee's clerk, and Lee then delivered them so indorsed to the plaintiffs' agent. On this state of facts, can the plaintiffs sustain an action against Hansford? And if, by indorsing said notes, he incurred any obligation to the plaintiffs, what was the character of this obligation? Was it a direct obligation as Lee's security to pay the amount of those notes, or was it a guarantee that Lee would pay them? If his obligation is direct as surety of Lee, the plaintiffs could recover from him on the general money counts, without using any diligence to make the debts out of Lee. On the other hand, if his obligation is only that

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of a guarantor, the plaintiffs cannot recover except upon a special count, nor, as a general rule, without the use of proper diligence to make that debt out of Lee. If he is to be regarded only as an indorser of negotiable notes on which the plaintiffs were first to indorse their names, the plaintiffs could not recover of him at all, he being a second indorser, and they occupying the position of first indorsers. There is, perhaps, no legal subject upon which there has been a greater diversity of opinion than the question, what is the liability of a stranger to a note, who signs his name on the back thereof. In many of the States it has been decided that, when a stranger signs his name on the back of a note before its delivery, he is *prima facie* liable, as though he was an original promisor. This is held to be law in Maine, *Childs v. Wyman*, 44 Me. 433; in Vermont, *Sylvester v. Downer*, 20 Vt. 355; in Rhode Island, *Perkins' Adm'r v. Barstow*, 6 R. I. 505; in Massachusetts, *Chaffee v. Jones*, 19 Pick. 260; in New Hampshire, *Currier v. Fellows*, 27 N. H. 366; in Indiana, *Cecil v. Mix*, 6 Ind. 478; in Michigan, *Rothschild v. Griz*, 31 Mich. 150; 18 Am. Rep. 171; in Minnesota, *Peckham v. Gilman*, 7 Minn. 446; in Texas, *Carr v. Rowland*, 14 Tex. 275; and in Louisiana, *Collins v. Trist*, 20 La. Ann. 348. In other States it is held that a party so signing is *prima facie* not an original promisor, but a guarantor. It is so held in Illinois, *Webster v. Cobb*, 17 Ill. 459; in Connecticut, *Ranson v. Sherwood*, 26 Conn. 437; and in Ohio, *Greenough v. Smead*, 3 Ohio St. 415, but in these States there is a difference in the extent of the liability of such guarantor. In other States it is held that such an indorsement by a stranger of negotiable paper before the delivery to the payee does not *prima facie* make the party liable, either as an original promisor or as a guarantor, but only as an indorser, and, therefore, not liable to the payee, who occupies the position of a first indorser. This is held in New York, *Herrick v. Carman*, 12 Johns. 160; in Pennsylvania, *Fegenbush v. Lang*, 28 Penn. St. 194; in Iowa, *Fear v. Dunlap*, 1 Greene, 331. In California and Mississippi, the payee of a negotiable note may sue a stranger who has indorsed it, his liability being *prima facie* that of an indorser, and not that of either a guarantor or original promisor. *Jennings et al. v. Thomas*, 13 Sm. & Marsh. 617; *Pierce, et al., v. Kennedy*, 5 Cal. 138. In New York, where the decisions have been very inconsistent, it is now held that where the note is not negotiable, and is indorsed by a third party before it is delivered to the payee, he may be held liable as an original promisor or as a

guarantor. *Cromwell v. Hewitt*, 40 N. Y. 491. In Massachusetts now, parol evidence would not be even admissible to show that a stranger who put his name on the back of a negotiable note when it was made, did not thereby intend to bind himself as an original promisor. *Way v. Butterworth*, 108 Mass. 509.

In the case of *Ray et al. v. Simpson*, 22 How. 341, CLIFFORD, J., in delivering the opinion of the court, states the law thus: "When a promissory note, made payable to a particular person or order, is first indorsed by a third person, as in this case such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name thereon at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as a guarantor. But if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then only be liable as second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers." It would be vain to endeavor to draw from this great mass of conflicting decisions any general principle which would meet with general support, I shall, therefore, attempt no review of these cases, no good would result from such review, and, indeed, the review of the decisions of a single State would, in many instances, lead to the conclusion that the inconsistencies of the decided cases were so great that no clear principle could be deduced from them. There are very few decisions touching this question in Virginia or West Virginia. All that we can do is to lay down reasonable principles for our guidance in the hope that our courts may, as cases arise, carry them out in a consistent manner. On laying down these principles, it is essential that they should accord with the decisions already rendered in Virginia and West Virginia. Taking them as my polar star, I conclude that when a negotiable promissory note, made payable to a

particular person or order, is first indorsed by a third person, and then delivered to the payee, such indorser is *prima facie* an original promisor or guarantor, as the payee may elect, or the payee may, by indorsing his name above that of such third person, and transferring the note, make him a second indorser in the commercial sense. But the true nature of the transaction, and the understanding of the parties to it at the time, may be shown by parol proof, and such proof may destroy this right of election by the payee, and the third person backing such note may be held liable only as an original promisor, or as a guarantor, or as an indorser according to the nature of the transaction, and the original understanding of the parties to it. If it is shown by evidence that such third person signed his name on the back of such a note at the time it was made as security for the maker and for his accommodation, to give him credit with the payee, such proof does not alter the right of the payee to hold him bound as original promisor, or as guarantor, or as indorser, as he may elect, but strengthens his *prima facie* right to elect; such option may be exercised at any time by the payee, and so long as he holds the note, may be changed at his pleasure, even after the institution of a suit by him against such third person. If it be shown that the understanding between such third person and the payee at the time of the transaction was that such third person should be bound only collaterally, such understanding will destroy the right which the payee would have otherwise had, of electing to hold him bound as original promisor. These principles are fairly deducible from the only cases on the subject decided in Virginia or West Virginia. *Watson v. Hunt*, 6 Gratt. 633; *Orrick v. Colston*, 7 id. 198, and *Kearnes v. Montgomery*, 4 W. Va. 29. If a third person indorses at the time it is made a negotiable note not drawn payable to him, he thereby indicates that he intends to bind himself for the payment of the note in some form, and if he has failed to indicate in what form, it is fair to presume that he intended to be bound in any manner that the payee might elect. If he indicates to the payee at the time, the manner in which he intends to be bound, though his purpose thus indicated be proven by parol, he cannot be held bound otherwise by the payee.

In the case of *Orrick v. Colston*, 7 Gratt. 189, the drawers of the note, wishing to borrow money of the payee, obtained the indorsement of Colston on a blank piece of paper as their surety, and

writing their own name on the other side, inclosed it by mail to the payee, who drew over the signature of the drawers, a promissory note, not negotiable, for \$1,000, payable to himself, and he sent a check for the \$1,000 to the drawers. The note not being paid by the drawers, the payee sued the indorser, Colston, and then wrote over his signature, "in consideration of the loan of \$1,000, by the payee, I guarantee the payment of the within sum of money." The declaration in the action brought against Colston charged him both as original surety for the debt and also as guarantor. The court say, "we are warranted in treating the case before us as if the perfecting of the note on the face of the paper, and the indorsing it by Colton had been contemporaneous acts, and had both preceded the delivery of the instrument to the payee." And they then consider the legal force of such an indorsement. The conclusion reached is, that the blank signature of Colston on the back amounted to either "an absolute promise to pay or a collateral guaranty, it would be just as fair to presume one as the other; it would be reasonable further to infer, that the person so indorsing in blank intended to leave it in the power of the payee, to elect in which of the two aspects he would hold him bound." The court accordingly held that it was competent for the payee to have charged Colston, the indorser, as a guarantor, or as a direct and absolute security. And that the writing of the guarantee over his name did not destroy the right of the payee to hold him bound in either character. It is true that in this case the note was not negotiable, and that in some of the States a distinction is drawn between the responsibility to the payee aforesaid, by a stranger, who at the time a note is made puts his name on the back, where the note is negotiable, and where it is not. Such distinction is drawn in New York. It is held now in that State, that if the note is not negotiable, such an indorser of it is *prima facie* bound as an original promisor, but if the note is negotiable, he is *prima facie* bound only as an indorser. *Richards v. Warring*, 1 Keyes, 576; *Cromwell v. Hewitt*, 40 N. Y. 491. And *Phelps v. Fisher*, 50 N. Y. 69; 10 Am. Rep. 433. But this conclusion that there is such a distinction between negotiable paper and paper not negotiable was not taken in New York without serious opposition. It was finally settled in that State by the case of *Hall v. Newcomb*, 7 Hill, 416. This case was twice argued before the Court of Errors of that State. Upon the first argument the court was equally divided

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in opinion, and upon the second argument it was decided by a vote of 18 to 8. In Connecticut, as before stated, it is held that the indorsement of a note not negotiable at the time it is made by a third party *prima facie* renders him liable to the payee only as a guarantor, and in *Perkins v. Catlin*, 11 Conn. 213, the court expressly repudiates any distinction in that respect between a note not negotiable and one that is negotiable. Such a distinction in such a case is also repudiated by the Supreme Court of Missouri, though there, under such circumstances, the indorser is held *prima facie* liable to the payee in either case as an original promisor. *Lewis v. Harvey*, 18 Mo. 74. The same is the law in Massachusetts, where no distinction in such a case is made. *Sumner v. Gay*, 4 Pick. 311. The distinction was repudiated in *Champion & Lathrop v. Griffith*, 13 Ohio, 228, and also in *Rothschild v. Griz*, 31 Mich. 150; 18 Am. Rep. 171, where in such a case the indorser was held liable as an original promisor. The New York cases are reviewed in this last case, and the distinction drawn by them in such cases between negotiable notes and other notes is repudiated by the court. And, generally speaking, no such distinctions have been made by the courts in these decisions, the cases having been generally decided without any regard to the fact that the notes were or were not negotiable. I conclude, therefore, that no such distinction can properly be drawn. But while an indorsement by a stranger, at the time a negotiable note is made, makes him *prima facie* responsible to the payee, either as principal promisor or as guarantor, as the payee may elect, yet "if the note was intended for discount, and he put his name on the back of it with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as second indorser in the commercial sense." This is the language of CLIFFORD, J., in delivering the opinion of the Supreme Court of the United States in 22 How. 350, and is a just conclusion from the authorities. In the case of *Kearnes v. Montgomery*, 4 W. Va. 29, the defendant, owing the plaintiff, proposed to him to take for his debt the bond of third parties, which the defendant had drawn payable directly to the plaintiff. The plaintiff refused to accept this bond, as it was payable to the plaintiff instead of to the defendant, unless the defendant would indorse it. The defendant wrote his name on the back of it, and the plaintiff accepted it, surrendering to the defendant his bond

which plaintiff held for the debt. The bond not being paid, the plaintiff brought an action of assumpsit against the defendant, and before the trial wrote over the defendant's indorsement, "for value received, I hereby become the security of the obligors in the within bond." The court held that the plaintiff could not hold the defendant bound as original promisor or security, but only as guarantor. This decision is in consonance with the principles laid down above, and with the case of *Orrick v. Colston*, 7 Gratt. 198. The evidence showed that "the defendant was to assume the same situation as to liability that he would have occupied had the paper been executed to him as payee, and transferred by him to the plaintiff." And such liability would not have been direct but only collateral. The *prima facie* responsibility of the defendants as original promisor at the election of the payee was therefore in that case overthrown by the proof showing that he was only to be bound collaterally. But the reasoning of Judge MAXWELL in that case was inconsistent with the views above expressed, and if I am right in the conclusion reached, that there is no good ground for the distinction between the *prima facie* liability to the payee of a stranger who has indorsed at the time it was made a note which is not negotiable and one which is negotiable, then the reasoning of Judge MAXWELL is inconsistent with the opinion of the court in *Orrick v. Colston*, 7 Gratt. 189. But these views of Judge MAXWELL do not seem to have been approved by Judge BROWN, for while he concurs with him in the decision rendered, he does not concur with him in his views, though Judge BERKSHIRE did. Judge MAXWELL, in his opinion, says: "If a stranger indorses his name in blank on the back of paper not negotiable he is *prima facie* guarantor, but this presumption may be rebutted by showing the original understanding of the parties, by showing an express agreement otherwise, or by showing circumstances from which one may be inferred." He, however, neither assigns any reason for this position nor does he cite any authority to sustain it. If we are to infer that he thought there was a difference in such case between the liability of a stranger who indorses a note not negotiable and one who indorses a negotiable note, I think both reason and authority show that such distinction is not well founded. The review of the cases before cited satisfy my mind that no such distinction can properly be drawn. And if there is no such distinction, then, as I have

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endeavored to show above, the responsibility of a stranger so indorsing would not be that of a guarantor only, but, at the option of the payee, it would *prima facie* be either that of an original promisor or that of a guarantor. In the particular case then before the court, if Judge MAXWELL'S view of what was shown by the evidence be correct, this *prima facie* case against the indorser that he might be held as original promisor was rebutted by the evidence, which shows that the understanding was that he was only to be bound collaterally. I regard this expression of opinion by Judge MAXWELL as a dictum not concurred in by Judge BROWN, and open to consideration whenever a case arises which fairly presents the point. In this case it is only necessary to decide that a stranger who indorses negotiable paper at the time it was made is *prima facie* liable to the payee as original promisor if he chooses to so regard him.

To apply the principles above laid down to the present case will be very easy. There is nothing in the evidence to show that Hansford put his name on the back of these notes with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payees. Had this been shown, he would have only been liable as a second indorser in the commercial sense, and could not have been sued by the payees. But it is shown that he put his name on the back of these notes, at the time they were made, as surety for the maker, and for his accommodation to give him credit with the payees. He is, therefore, responsible to them at their option, either as an original promisor, or as a guarantor. The only ground for questioning for a moment the true intention of the parties in this transaction is the fact that the plaintiffs' agent drew the notes payable at one of the Charleston banks. But his declared purpose in so drawing them was that the plaintiffs, *if they should wish to do so*, might have them discounted. In other words, it was understood at the time by the drawer that the plaintiffs might continue to hold the notes if they chose, or have them discounted if they thought proper. Had Hansford indorsed it with this understanding he would have been responsible as original promisor, if the payees chose to hold him responsible, unless in the exercise of their discretion expressly reserved the plaintiffs chose to indorse the notes first and have them discounted. If this had been done they could not have held Hansford liable to them at all. But in point of fact Hansford was not informed that

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the plaintiffs, or their agent, had any idea of having the notes discounted; he indorsed them simply as surety for the drawer, in and for his accommodation, and to give him credit with the payees. The plaintiffs therefore had a right to hold him as an original promisor, and to recover of him the amount of these notes on the common money counts in the declaration. And it follows the court did not err in permitting both these notes to be read as evidence on the trial of the case.

The judgment of the Circuit Court of Kanawha, rendered in this case on June 11, 1874, must, therefore, be affirmed, and the appellees must recover of the appellant their costs about this appeal expended in this court, and damages according to law.

Judgment affirmed.

NOTE BY THE REPORTER.—In a case like this the position of the stranger indorser was held in *Jones v. Goodwin* (39 Cal. 493), 2 Am. Rep. 473, to be strictly that of indorser. (See id., note, p. 473.) In *Ives v. Boesch* (35 Md. 202), 6 Am. Rep. 411, that of joint maker. In *Eulbert v. Finkbeiner* (66 Penn. St. 243), 8 Am. Rep. 173, that of second indorser, *prima facie*, but parol evidence was admitted to show that it was that of guarantor. In *Chaddock v. Van Ness* (35 N. J. 577), 10 Am. Rep. 236, that of second indorser or surety, and parol evidence was admitted to show which; but *per se* it implies no liability whatever. In *Chafes v. Memphis, etc., R. R. Co.*, 84 Mo. 193, *prima facie* that of maker, and a *bona fide* purchaser is bound by an agreement between him and the payee, that he is to be liable only as indorser. In *Isler v. Cohen*, 1 Baxt. (Tenn.) 421, that of indorser *prima facie*, subject to enlargement by parol evidence. The same in *Best v. Hopple*, 3 Colo. 137. In *Browning v. Merritt*, 61 Ind. 435, *prima facie* that of indorser, but subject to explanation. As to Pennsylvania, see *Arnot's Administrators v. Symonds* (35 Penn. St. 99), *post*.

The differences of ruling on this subject in the different States are sufficiently pointed out in the principal case. The distinction between negotiable and non-negotiable paper seems peculiar to New York.

The cases of *Moore v. Cross*, 19 N. Y. 227; *Bacon v. Burnham*, 37 N. Y. 616; *Meyer v. Huber*, 47 id. 265; *Phelps v. Vischer*, 50 id. 69; *Clothier v. Adrance*, 51 id. 323, have settled the law in New York that one, other than the maker, who indorses a negotiable promissory note before its delivery to the payee, is presumptively a second indorser, and is entitled to all the rights, privileges and exemptions incident to that situation; that *prima facie* he is not liable to the payee, whose name precedes his on the note, but only to subsequent indorsers; that an action upon such a note by payee against indorser may nevertheless be maintained, provided the former shows (which he may do by parol) that the apparent relative situation of the parties is not the real one, and that the payee took the note from, and gave credit or parted with value to the maker with the knowledge of the indorser and upon the faith of his indorsement. At first it was held that, as the payee is presumably liable to the indorser, he must, in order to recover of him and to avoid circuity of action, indorse the note without recourse, and could do so even at the trial, but since *Moore v. Cross*, *supra*, this requirement has been abandoned, and it is now held that, having the right so to indorse, it will be presumed to be done and treated as if done, and therefore in fact need not be done at all.

But as to non-negotiable paper a different rule has prevailed. The doctrine which has grown up in New York on this point seems to have been grounded upon the earlier cases, and notably that of *Joachim v. Ames*, 3 Mass. 274, where it was held that an indorsee for value of a non-negotiable note may write over the name of the indorser a promise to pay the contents of the note to the indorsee, who may thereupon sue the indorser upon such promise. After dicta in *Dean v. Hall*, 17 Wend. 214; *Seabury v. Hungerford*, 3 Hill, 84, and *Hall*,

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v. Newcomb, 8 id. 233, the precise question arose in *Griswold v. Slocum*, 20 Barb. 402, A. D. 1851. This action was against the indorser of a note made by S. & Co. payable to the plaintiff. The complaint was in the usual form of indorsee against indorser. The defendant claimed to be liable only as second indorser. *Per PARKER, J.* "The defendant cannot be charged as indorser because the promissory note is not negotiable. * * * The defendant put his name on the note as security at the time the note was made and before its delivery to the plaintiffs. I think the law well settled that under such circumstances the defendant may be held liable as maker or guarantor; unless he is thus liable he escapes all liability on his contract. His name is placed on the back of the note, but he is not strictly an indorser, because a legal indorsement can only be made on a negotiable note. * * * The distinction in this respect between paper negotiable and not negotiable has been plainly recognized, and is now well established. All the conflict of authority has been in regard to negotiable paper. There has been none in regard to paper not negotiable," quoting *Josselyn v. Ames*, *Dean v. Hall*, *Seabury v. Hungerford*, and *Hall v. Newcomb*, *supra*.

The next case in New York was *Richards v. Warring*, 39 Barb. 42, 1863. The note here was similar in form to the one in *Griswold v. Slocum*, and no steps had been taken to charge the defendant as indorser. *Per PORTER, J.:* "What then is the legal effect to one who writes his name, without any thing more, upon the back of a promissory note not negotiable which is thereupon transferred to the payee named in the note, and who at the time of the delivery thereof to him parts with the full consideration mentioned in it, upon the credit of the note?" After defining an indorsement as the writing of one's name on the back of or across a note, etc., by which the property in the same is transferred, the court say: "This effect, that is, a transfer is not wrought upon a note not negotiable, by a signature across the back of it. The title, or property, does not pass by merely writing the name thus upon it. * * * The note is thereby not transferred. * * * Not being such an indorser as to pass the title * * * the defendant is not liable as such. But did not the defendant therefore make any contract with the payee by so affixing his name to the note? * * * It is insisted, and with great force, that he intended only to bind himself as indorser, and not otherwise, and that the court cannot make another contract for him. It is clear that he put his name on the note, knowing that the money was to be obtained on the note from Richards (payee). It is equally clear that he knew his name was wanted to give credit to the note to Richards." After reasoning that the legal presumption as to the intent of the defendant is opposed to the contract of an indorser, and that his signature warrants the legality of the contract, and that the only other parties to such a note are maker and guarantor, and that he could not be held liable as the latter, the conclusion is reached that the defendant is a maker or joint promisor; that the law prescribes no place for the signatures of maker and indorser, and that although it is customary for the one to sign on the face and the other on the back, yet the precise locality of their respective signatures is immaterial. The opinion cites numerous authorities, especially *Motes v. Bird*, 11 Mass. 436; *Griswold v. Slocum*, *supra*; *Lake v. McVean* (an unreported case), and *Chitty on Bills*, 177. On appeal to the Court of Appeals, this was there affirmed. 1 Keyes, 576. The opinions were written by HOGEBROOM and DAVIS, JJ. HOGEBROOM, J., says, that it was fair to infer from the evidence that the defendant was not contemplating the contingent liability of an indorser, "for the law, which he is presumed to know, did not admit of such a relation, but rather that he would indorse the paper by writing his name upon the back of it and contract thereby such relations to the other parties to the paper as such a signature would confer or entail upon him. He designed then, to be a surety of the makers to the payee, and may be held in that character. * * * He is in effect a maker of the note, an original party to the instrument, whose name, equally with that of the other makers, was intended to give currency and credit to it in the hands of the payee, and on the faith of whose signature, either as principal or as surety for the other makers, the paper was discounted. The signature on the back of the instrument is not inconsistent with his liability as maker, if he in fact intended to assume that character." The opinion concludes with the rule that: "If the note be not negotiable, the payee is authorized to overwrite a contract of guaranty, on an original promise to pay the note over the name indorsed, and may maintain an action thereon. Because, unless the indorsement is held to imply such an authority, it is

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wholly inoperative and senseless, as there can be no liability as indorser in strictness, of a non-negotiable note." DAVIES, J., says: "When a party writes his name on the back of a note not negotiable, as there is no contract of indorsement, the courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by allowing the holder to overwrite the indorser's name, with the real contract implied by law, or recover against him as a maker or guarantor of the note." Citing *Edwards on Bills*, 167, 230, and cases cited above.

Crumwell v. Hewitt, 40 N. Y. 491, 1859, differed from *Griswold v. Stocum* and *Richards v. Warring*, in that there the actions were by payees against indorsers, who were charged as makers or joint promisors, whereas here was a suit against the payee (who had indorsed to the plaintiffs), seeking to hold him as guarantor. No steps had been taken to charge him as indorser. The court below held the suit could not be maintained. On appeal the judgment was reversed on the authority of *Richards v. Warring*. The New York distinction is criticised in *Rothschild v. Griz*, 31 Mich. 150; 5 C. 18 Am. Rep. 171.

The result of the various decisions seems to be as follows, viz.: that except in the technical sense of the words there is no such thing in New York as indorser or indorsement of non-negotiable paper; that the blank subscription of one's name upon or across such paper constitutes the subscriber presumptively a co-maker or joint promisor and surety of the maker, and he can be declared and recovered against as such; that a consideration is not presumed and must always be alleged and established; that proof of an intent to subscribe strictly as indorser, and to be liable only as such, is repugnant to the form of the contract, and will not be received; that subject to this rule the parties may severally show and claim the benefit of the exact agreement and understanding upon which the indorsement was made; that the holder of the note may overwrite the name of the blank indorser with such agreement or understanding, or with a contract of original promise or guaranty or suretyship, and may recover upon such overwritten contract; and finally, that the maxim *ut res magis valeat quam pereat*, applies.

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(10 W. Va. 507.)

Insurance — sale of part of subject — statement of ownership.

- A policy of insurance provided that if the insured should make any other insurance on the property, or any part thereof, or if the property should be sold or transferred, or any change should take place in the title or possession thereof, without the company's consent, the policy should be void; and that when the property had been sold or otherwise disposed of, so that all the interest on the part of the insured has ceased, the insurance on such property should terminate. Held, that the insurance on the entire property was not, by these provisions, forfeited by a sale of a portion of the property.
- A policy provided, that if the interest of the insured is not truly stated, or is other than the entire unconditional and sole ownership, it must be so expressed in the policy, under penalty of forfeiture. Held, that the policy was not rendered void by the failure to disclose that at the time the policy issued there was a deed of trust on the property insured, no inquiry having been made about the state of the title.*

* See *Manhattan Fire Ins. Co. v. Weill* (28 Gratt. 389), 25 Am. Rep. 394.

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ACTION on a policy of insurance against fire, whereby the defendant, in consideration of \$30, insured the plaintiff to the amount of \$2,000 as follows, viz.: \$640 on her two-story brick building occupied by Arnold & Co.; \$140 on shelving, fixtures, furniture, etc., contained therein; \$547 on her two-story building, occupied by Laidley & Miller; \$113 on the shelving, fixtures, etc., therein; \$480 on her two-story building, occupied by Wilson; \$80 on shelving, etc., therein. The policy contained the following provisions:

"First. If the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the company written thereon.

"Second. Or if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, without the consent of this company indorsed thereon.

"Third. Or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy.

"Fourth. Or if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, or if the buildings insured stand on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, then and in every such case this policy shall be void.

"Fifth. When the property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

The opinion states the other facts. The plaintiff had judgment.

William H. Hogeman, for plaintiffs in error.

C. E. Doddridge, for defendants in error.

GREEN, President. [After stating the case, and passing upon questions of jurisdiction and pleading.] The remaining special plea rejected by the court alleges that the plaintiff, without the knowledge or consent of the defendant, after the issuing of said policy, and before said fire, did sell and transfer by deed a *portion*

of said property to one Arnold, and, on the trial of the case, the court excluded the deed to Arnold as evidence, having then before it the whole policy. The defendant insists by this plea, that, under the provision of said policy, numbered two above, the sale of a portion of the property insured, without the consent of the defendant, rendered void the whole policy. He interprets this provision as prohibiting, under the penalty of forfeiture of the insurance, a sale without its consent of *any portion* of the property insured. Admitting for the present that this provision did prohibit the sale of *any portion* of the property insured without the consent of the company, the inquiry is, did such sale operate as a forfeiture of any portion of the insurance, and if so, how much. The defendant insists that the policy is an entire contract and consequently if, by a breach of any provision of the contract, any forfeiture has been incurred by the assured, such forfeiture must necessarily be of the entire insurance. It is often a question of great difficulty to determine whether a contract is entire or separable. In construing a contract to determine this question, we are to be guided by a respect to general convenience and equity and by the good sense and reasonableness of either construction in the particular case rather than by any inflexible rules or by an unreasonable adherence to the words of the contract in disregard of its spirit. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard*, 13 How. 340; *Rodemer v. Hazlehurst*, 9 Gill, 294; *Dibol & Plant v. Minott*, 9 Iowa, 403; *Smith's Lead. Cas.*, vol. 1, p. 42; *Brown v. Vinel*, 3 Md. 533. As a general rule, where the consideration paid, or to be paid, is entire, the contract should be held to be entire, though the subject of it should consist of separate and independent items; but when the price to be paid is apportioned to separate and distinct items, the contract should be construed as severable. *Withers v. Reynolds*, 2 Barn. & Adol. 882; *Miner v. Bradley*, 22 Pick. 457; *Cunningham v. Morrell*, 10 Johns. 203; *Dibol & Plant v. Minott*, 9 Iowa, 403. A policy of insurance is a contract so different from those in which these general rules have been laid down, that it is doubtful whether they can be applied to this peculiar contract, or in what manner the application of them should be made. Instead, therefore, of resorting to these rules, which are just and reasonable in ordinary contracts in ascertaining whether a policy is to be interpreted as entire or separable, it seems to me that it is safer to apply to the general principle before announced, that,

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in ascertaining the character of the policy in this respect, the courts should be guided by a respect to general convenience and equity, and by the good sense and reasonableness of either construction, bearing in mind that "the law leans strongly against forfeiture, and it is incumbent on the party, who seeks to enforce one, to show plainly his right to it." *Philadelphia and Wilmington Railroad Company v. Howard*, 13 How. 340; and that a policy being a contract dictated by the insurance company should be construed most strongly against it. *Bryan v. Peabody Insurance Company*, 8 W. Va. 605. Applying this general principle to the case before us, I am inclined to think that even if the policy could be construed to impose a forfeiture for an alienation, without the consent of the company, of any portion of the property insured, that such forfeiture could not extend beyond the insurance of the property mentioned in the policy as separately insured, of which the property so sold constituted a portion, if indeed it should be extended beyond the forfeiture of the insurance of the specific property sold. That a sale, for instance, of any portion of the fixtures or furniture in the Arnold storehouse could at most only operate as a forfeiture of the \$140 insurance on such furniture and fixtures, and would not operate as a forfeiture of the \$547 insurance on Laidley & Miller's store, or on any other property separately insured in the policy. This conclusion is sustained by highly respectable authority. It is true there are some high authorities inconsistent with this conclusion, but many of the authorities supposed to be inconsistent with this view are only so seemingly, and when examined will be found not to militate against this conclusion. All the authorities agree that if, instead of reciting an entire consideration of \$30, for the insurance, a separate consideration for each of the six insurances named in the policy had been recited that the contract should be interpreted as separable, and that then clearly a forfeiture of the policy, by sale or otherwise, would be interpreted as a forfeiture of so much of the policy as included the property sold. That in such case the policy ought to be construed as six several policies included in one contract, and that the insurance arising from any one of them might be forfeited without in any manner affecting any of the others. And it does seem to me unreasonable to hold that the mere recital of the entire consideration together should change the interpretation, and subject to forfeiture the six separate insurances, because a portion of the

property named in one of them had been sold ; especially as it is obvious that this sale of a portion of the property named in one of the insurances could in no manner tend to the prejudice or injury of the company so far as the other five separate insurances were concerned. Such construction seems to me both unreasonable and contrary to the real meaning of the parties to the contracts. When they declared the policy forfeited by the sale of any portion of the property assured (supposing that to be the true meaning), they ought to be understood as meaning the policy so far as it insured the property, a portion of which was sold. In the contemplation of the parties, this policy included six separate policies of insurance, and that by the forfeiture of the policy was meant of that particular one of the six policies as to which there had been a violation of this provision prohibiting alienation. Many of the authorities, which are apparently inconsistent with this conclusion, are not really so. Thus in numerous cases where in mutual insurance companies one premium note was taken for several insurances on different buildings or other property contained in one policy, and by the policy this premium note was a lien on all the several buildings or other property named in the policy, then, where there has been a misrepresentation of the amount of the liens on any one of the buildings or other property declared by the policy to be a forfeiture, it has been held that this is a forfeiture of the entire policy, though in it there was a separate valuation and insurance on each separate building. *Gould v. York County Mutual Insurance Co.*, 47 Me. 403 ; *Lovejoy v. Augusta Mutual Fire Insurance Co.*, 45 id. 472; *Brown v. People's Mut. Ins. Co.*, 11 Cush. 280; *Friesmuth v. Agawam Fire Ins. Co.*, 10 id. 587.

These decisions are clearly right, not as I think merely because the consideration recited was entire, but because the entire consideration as represented by the premium notes was a lien on all the property named in the policy, and a misrepresentation of the incumbrances upon any one piece of property diminished the company's security for the premium due on the separate insurance of the other property included in the policy, but the title of which was not misrepresented. The same has been held properly to be the law in similar cases where the forfeiture was produced by a sale of a portion of the property separately insured, the premium note being a lien on the entire property in the policy. *Barnes v. The Union Mut. Fire Ins. Co.*, 51 Me. 111.

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It has been held that where two buildings were closely connected together, and the policy contained a separate insurance on each one for an entire consideration, though it did not appear that this consideration was unpaid, and a lien on both buildings, yet if one building is used for a forbidden purpose, it will avoid the entire policy. *Lee v. Howard Fire Ins. Co.*, 3 Gray, 583; *Fire Association v. Williamson*, 26 Penn. St. 196. These decisions, though not sustainable if the two insurances in the one policy were regarded as though in separate policies, yet it would not follow from them that if the cause of the forfeiture did not in any way increase the risk on the other building, as in the case of a sale of one, that both insurances would be forfeited. And in the last case above cited, the court seems to base its decision specially on the fact that both buildings were destroyed through an explosion in one of them, of gunpowder, kept in it in violation of the policy. In *Gottzman v. Pennsylvania Ins. Co.*, 56 Penn. St. 210, the court went further, and held that if the consideration recited in the policy was entire, though it was fixed at one and one-half per cent on the property insured, and there was a separate amount insured on a hotel and on the liquors in the hotel, if there was a misrepresentation which avoided the insurance on the hotel, there could be no recovery on the insurance on the liquors, the contract being held to be entire. The court refers to the Massachusetts cases above quoted, and does not seem to notice that most of them were based on the fact that the premium notes were a lien on all the property insured in the policies. It admits the harshness of the case, but holds that it is but carrying out the contract made by the parties. It seems to me this contract was not correctly construed by the court, especially as it stated that the premium was one and one-half per cent of the insurance, which, it seems to me, might well be regarded as fixing this per cent on the value of the liquor as the portion of the premium to be paid for the insurance on the liquor, which, had it been expressly done, the court admits, would have made it a separable insurance, and it might then have been recovered, though the other insurance was void.

In the case of *The Associated Fire Ins. Co. v. Assum*, 5 Md. 165, a majority of the court held that a policy of insurance, "to the amount of \$1,000, say \$700 on the stock of books and stationery, and \$300 on music, musical instruments, fancy goods and medicines," was an entire contract; but Judge MASON dissented and

was of opinion that this constituted two distinct and separate insurances. I presume it all constituted together one stock of goods and his decision may not perhaps apply where there were two different stores and stocks of goods. But in opposition to these views are high authorities. In the *Phoenix Ins. Co. v. Lawrence et al.* the company, for the consideration of \$14, insured Lawrence & Co., against loss by fire for one year, "to the amount of \$200 on their frame storehouse and \$1,200 on their stock of goods in said storehouse," and the court held though the policy was void as an insurance on the house, it not being owned by the assured, yet the insurance on the stock of goods was not, therefore, void, the court saying that "we see no reason for excepting this case from the general rule by which a policy making separate insurances upon several subjects is treated as separate policies would be. So in *Loehner & Co. v. Holmes Mutual Ins. Co.*, 17 Mo. 247, it was held that a policy upon a house and its furniture separately appraised, though void as to the house, because the insured failed to give notice of an incumbrance, was not, therefore, void as to the furniture, which decision was affirmed in 19 Mo. 628. And in *Clark v. New England Mutual Fire Ins. Co.*, 6 Cush. 342, the exact facts of which are stated in May on Insurance, 303, note, the company, for \$5 in cash and a deposit note of \$371 insured Clark for \$2,500, \$2,000 on his tavern house and \$500 on his shop. The shop was sold, and by a provision in the policy, the policy thereby became void. The court held, "that the shop was valued separately and was insured separately, as a separate, distinct and independent subject of insurance, though insured in the same policy. The alienation of the shop would avoid the policy *pro tanto* and only *pro tanto*. The tavern house and shop being insured separately, the alienation of one would no more affect the insurance on the other than if they had been insured in separate policies." This decision is inconsistent with other Massachusetts cases above referred to, but though some of them are of more recent date, yet they do not overrule this case, or even make a reference to it. This fact seems to me to subtract from the weight which might otherwise be attached to these Massachusetts cases.

I am, therefore, inclined to the opinion, that if this policy had provided for its being void if any *portion* of the property assured was alienated by the assured, without the consent of the company, the sale of the Arnold building would not have avoided the insur-

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ance on either of the other buildings, or on their fixtures, or furniture. And it might be even questioned whether it would have even rendered void the insurance on the furniture in the Arnold store. On this subject, May in his work on Insurance, 303, 304, says: "Upon principle, it does not seem to be of any consequence whether the valuation be separate and distinct, or not. Surely a merchant who insures his store and stock in trade, or a farmer who insures his barn and contents, may recover for the unsold balance of his stock, notwithstanding he daily sells a portion of it. The diminution of insurable interest coincides with a diminution of the right to claim for loss, and relatively there is no change in the situation. To say that the policy is thereby *pro tanto* avoided, is not so correct an expression as that the amount which the insured would have a right to recover under it is *pro tanto* reduced. Nor will the result be different, though it be stipulated that the policy is to be void upon the sale of the whole or any part of the property insured. Nothing short of a sale of the whole will deprive the assured of his right to recover at all. If he sells part, he merely forfeits his right to claim for the loss of that part, and for the simple and obvious reason that, having sold it prior to the fire, he did not, and he could not lose it. But if he keeps up his stock, he recovers to the full amount." And as sustaining him in this reasoning, he refers to *Lane v. Maine Mutual Fire Ins. Co.*, 3 Fairf. (Me.) 44; *Hobbs & Henly et al. v. Memphis Insurance Co.*, 1 Sneed (Tenn.), 444, and *Wolfe v. Security Fire Ins. Co.*, 39 N. Y. 49.

It is unnecessary to express any opinion upon the soundness or unsoundness of this reasoning, as the evidence shows that the plaintiff in the case does not claim any thing for loss of furniture in the Arnold store; nor is it necessary to decide in this case what would have been the effect of the policy, providing that it should be void if any part of the property insured was sold without the consent of the company. For, as I interpret the provisions of the policy, it does not provide for the policy being void, unless the whole of the property insured is sold. The language of the provision relied upon as avoiding the policy being the provisions above recited and numbered two, is: "If the property be sold without the consent of the company indorsed on the policy, then in such case this policy shall be void."

This court, in the case of *Bryan v. Peabody Insurance Company*,

8 W. Va. 605, had before it the construction of this provision in a policy of insurance: "If the above-mentioned premises shall become vacant, or unoccupied, and so remain for more than thirty days, without notice to, and consent of this company in writing, this policy shall be void." This court held that this provision "must be construed to mean and apply to the whole or entire premises, and not merely to a part thereof. Had the company intended otherwise, it is reasonable to have supposed it would have so declared. It would not have contented itself with the general and comprehensive expression 'above-mentioned premises,' but would have manifested its meaning and intention in common and plain language, such as '*above-mentioned premises or any part thereof.*'" Thus impressed, the court held that the assured did not violate his contract in not giving notice of the vacating of a part of the premises, "although it might be true that the vacation of the part of the premises increased the risk." It would have been much less unreasonable to have construed this provision as violated by a vacation of a part of the premises than to construe the provision now under consideration to be violated by a sale of a part of the property. For what is prohibited under penalty of a forfeiture of the policy is a sale of the property, and not a sale of the property, or any part thereof; and the omission of the words "or any part thereof," is made the more striking by these words, "the property hereby insured, or any part thereof," being used in the provision numbered one, just preceding; and that it was not intended that the entire policy should be avoided by a partial sale, is clearly manifested by the provisions in the said policy, numbered above as five, which provides that the policy shall immediately terminate when the property has been sold and delivered, or otherwise disposed of, *so that all interest on the part of the assured in it has ceased*, clearly implying that the policy should not terminate or be rendered void by any sale which did not produce the effect of causing all interest on the part of the assured in the property to cease. So construing the policy, I hold that the sale of the Arnold store did not avoid the insurance of the other two stores, their fixtures and furniture; and the Circuit Court, on the trial, did not err in so interpreting this policy.

In the other case of *William A. Quarrier, Trustee of Mrs. D. R. Laidley, v. The Aetna Fire and Marine Insurance Company of Wheeling*, the suit was brought on a policy identical with that of

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the Peabody Insurance Company. The declaration and pleadings were the same, the same objections were made to the pleas offered, and the same action taken by the court on the demurrer to the declaration and upon the pleas, and the same exceptions filed, but in this case a third special plea was offered and rejected. This plea alleged that the plaintiff heretofore, to wit: on the 19th day of May, 1873, executed and delivered, without the knowledge or consent of the defendant, a deed conveying a part of the real estate, with one of the buildings insured thereon, it being one of the buildings injured by the fire, to one Joel S. Quarrier, in trust, to secure certain indebtedness. This, the plea alleges, avoids the policy, by reason of a provision in it that in case of any false representation by the assured of the condition, situation, or occupancy of the property insured, or any omission to make known every fact material to the risk, or any misrepresentation whatever, or if the interest of the assured in the property be not truly stated in the policy, then the policy shall be void; and also by reason of the provisions in said policy before cited and numbered two and four. The plea is defective in not alleging whether the deed of trust was executed before or after the policy was executed and which particular provision of the policy was thereby violated, but disregarded its form, it presented no real defense; if the deed of trust was executed after the policy, it did not violate the provision numbered three, for it was not a sale of the property, or any change of the title within the true meaning of this provision. For it has been often decided that a mortgage or deed of trust, before its foreclosure, is no alienation or change of title according to the true interpretation of these words when used in a policy of insurance. See *Shepherd v. Union Mutual Fire Insurance Company*, 38 N. H. 232; *Fulson v. Belknap County Mutual Fire Insurance Company*, 10 Fost. 231; *Howard Insurance Company v. Bruner*, 23 Penn. St. 50; *Jackson v. Massachusetts Mutual Fire Insurance Company*, 23 Pick. 418; *Conover v. Mutual Insurance Company of Albany*, 3 Den. 254; s. c., 1 Comst. 290; *Tittmore v. Vermont Mutual Insurance Company*, 20 Vt. 546; *Pollard v. Sommerset Mutual Fire Insurance Company*, 42 Me. 221; *Smith v. Monmouth Mutual Fire Insurance Company*, 50 id. 96; *Dutton v. New England Mutual Fire Insurance Company*, 9 Fost. 153; *Rollins v. Columbian Mutual Fire Insurance Company*, 5 id. 200; *Rice et al. v. Tower & Trust.*, 1 Gray, 426; *May on Insurance*, 294. It is true that the con-

trary doctrine has been held in Indiana, in the case of *McCulloch v. Indiana Mutual Fire Insurance Company*, 8 Blackf. 50, and *Indiana Mutual Fire Insurance Company v. Coquillard*, 2 Carter, 645; and also in *Western Massachusetts Insurance Company v. Riker et al.*, 10 Mich. 279.

But these decisions ought not to be regarded as rendering even doubtful the propriety of the conclusion that a deed of trust is neither a sale nor change of title such as was contemplated by the provisions of the policy when it declared that a sale or change of title should render void the policy. If the company had intended that a deed of trust should have this effect, they should have so provided. If that was their purpose they have not used appropriate language to express such purpose. They have, to say the least, left it in doubt. And a contract should be avoided only by clear language and never by doubtful phrases. If the deed of trust was executed before the policy, does the fact that it was not made known to the company render the policy void? It is not alleged that there was any misrepresentation nor has there been any omission to make known any fact material to the risk. If, as we have seen, the company permitted the assured to execute any deeds of trust he chose after the policy had been issued, as we have seen they did, is this not conclusive that they did not consider the giving of a deed of trust, by the assured, materially increased their risk, and therefore the failure to notify them, when the policy was issued, that a prior deed of trust had been given, cannot be regarded as an omission to make known a fact material to the risk; nor can it be said that the interest of the assured in the property was not truly stated in the policy. It simply states that the property is his; and there being a lien upon it, did not prevent it from being his nor render this statement untrue. We have seen that the policy itself shows that the company regarded the existence of such lien as not materially affecting the risk and unless they inquired particularly into the title of the property, a general statement by the assured that the property was his is sufficient. See *Flanders on Fire Insurance*, 372, 373; *Strong v. Manufacturers' Insurance Co.*, 10 Pick. 40; *May on Insurance*, 310; *Cumberland Valley Mutual Pro. Co. v. Mitchell*, 48 Penn. St. 374. We conclude, therefore, that the court did not err in rejecting this third plea.

[Some minor points omitted.]

Both of the cases are remanded to the Circuit Court of Kanawha,

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with directions to grant to the plaintiffs in each of these cases leave to amend the declarations and to be further proceeded with according to the principles laid down in this opinion, and further according to the principles and rules governing courts of common law.

Judgments reversed, and cases remanded.

STOLLE V. AETNA FIRE AND MARINE INS. CO.

(10 W. Va. 546.)

Insurance — condition — waiver — estoppel.

A policy of insurance provided that it should be void in case of assignment before loss, without the consent of the company indorsed thereon. The secretary of the company told the insured that he could assign the policy without such consent. *Held*, that this waived the condition. (*See note, p. 597.*)

ACTION on a policy of insurance. The opinion sufficiently states the facts.

Wm. H. Hogeman, for plaintiff in error.

C. E. Doddridge, W. A. Quarrier and Smith & Knight, for defendants in error.

GREEN, President. [After stating the case and disposing of a preliminary question.] The evidence shows that Captain Moore, of Charleston, procured this policy for Field, and that the premium on it was paid by Field to Moore; that Mr. Reynolds was a clerk of Moore who is an insurance agent. Field proves that "on August 29, whilst Captain Moore was at the White Sulphur Springs, the plaintiff came to him to transfer policy for Field; he filled up the assignment, and Field signed it; at the foot of the assignment there was a memorandum to be signed by the secretary; he saw Field sign transfer; went to Wheeling on business for Burdett; went to Peabody insurance office and met Mr. Rogers; he introduced him to J. R. Miller, secretary of Aetna Insurance Company, the same party who signed the policy in evidence; told Miller he had transferred policy for Field to Stolle, and as the form of his

transfer had to be sent to home office to be approved by secretary, said to him, 'as I am here, and have mentioned it to you, would it be necessary to send policy on to be approved,' and he said 'no, it would not,' and he left him there. This was, he thinks, September 2, 1873. There was no agent for defendant in Charleston. He was clerk for Captain Moore. The conversation with Miller took place in door of *Ætna* office."

The assignment on the back of the policy referred to by witness, Reynolds, is in these words:

"For value received, I hereby transfer, assign and set over to Gus Stolle and his assigns, all my title and interest in this policy, and all advantages to be derived therefrom.

Dated this 29th day of August, 1873.

JAMES L. FIELD."

And the form of the approval, printed at the foot thereof referred to also by witness, Reynolds, was in these words:

"Approved W. Va., this — day of — 187—.

Secretary."

These questions arise from this transfer. The first is will the provision in the policy, that unless an assignment of the policy is approved by the company by an indorsement thereon that the policy shall be void, be enforced by the courts. And secondly, can this approval be waived; and thirdly, if so, do the facts above deposed to amount to a waiver. The courts will enforce such a provision in a policy, provided the assignment prohibited is as in this case before the loss. If, however, the policy attempts to prohibit, under penalty of forfeiture of the policy, the transfer after the loss has occurred, the courts will not enforce it; they regard such prohibition as contrary to the public policy. *Minturn v. Insurance Company*, 10 Gray, 507; *Smith v. Saratoga Insurance Co.*, 1 Hill, 497. In the first of these cases, it was admitted that upon a proper assignment of a policy, assented to by the insurers, the assignee could sustain an action as upon a new and original promise to indemnify against loss, if any occurs, but it was held that if the policy required the assent of the company to be in writing, it could not be proved by parol. In the second of these cases, the policy had a clause in it whereby the policy was declared void, if assigned without the consent of the company in writing, and the court held, unless waived

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by the company, this stipulation of the policy would be enforced. It seemed to be assumed in this case that this provision in the policy might be waived. In the case of the *Pennsylvania Insurance Co. v. Bowman*, 44 Penn. St. 89, the policy provided "that the policy should be void upon assignment thereof, unless notice is given at the office of the company, and the same be approved and indorsed thereon by the secretary or other authorized officer of the company." This policy was assigned absolutely by written assignment. Sometime afterward, the president of the company, on a separate piece of paper, approved an assignment of the policy to these parties as collateral security for certain purposes. This paper was attached to the policy by a wafer and is supposed to have referred to the absolute assignment aforesaid, though the date of the assignment approved is not given in the approval. After the loss of the property, a letter was written by the president of the company, though not signed officially, to these assignees, asking certain proposals in reference to the property, looking to an adjustment of the loss with them. The court held this approval of the president though not indorsed on the policy was sufficient, and add: "But whether it were or not, it is clear that the defendants, by their conduct, and by this letter, waived a more strict compliance with the condition, which they had a right to do, as they could have waived entirely a provision intended only for their protection." I concur in the conclusion, that this provision may be waived by the conduct of the defendant, or, to speak more properly, the defendant, by his own conduct, may be estopped from insisting on this provision. The remaining question is, did the defendant's conduct in the case before us estop it from insisting on the fact that the approval of this assignment was not indorsed on the policy. The general question as to what conduct of the defendant will amount to a waiver or an estoppel of the company is discussed in *Muhleman v. Nat. Ins. Co.*, 6 W. Va. 508, and the conclusion reached: "The act relied on as a waiver must be such as to estop a party from insisting on performance of the contract or forfeiture of the condition. There must be some act or declaration of the defendant or of the defendant's agent, to the plaintiff, which so affected the conduct of the latter to his injury as that it would be unjust now to permit the defendant to set up or have the benefit of the clause of the policy in question. It is not necessary to an equitable estoppel that the party should intend willfully to mislead; but whatever may be the

intent, if he makes such a representation as a sensible man would take to be true, and believe that it was meant he should act upon it, and he does so act, the party making the representation is precluded from contesting its truth." To sustain which position the court refers to *Bigelow on Estoppel*, 524, 553; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 164; *Continental Nat. Bank v. National Bank of Comm.*, 50 id. 575; *Herman's Law of Estoppel*, 343, § 331. In the case under consideration there is this provision in the policy: "This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force." Under this provision the assured had a right to terminate his policy at any time, and in such case had a right to demand the return of the premium paid, except that the company could retain the customary short rates for the time the policy had been in force. The company had a right to decline to consent to the assignment of the policy, but if they had done so, the assured would, of course, have exercised his right to terminate the policy and demand the return of the premium paid for a year in advance, less the customary short rates for the time the policy had been in force. Of this right, however, the assured was deprived by being induced to omit to exercise this right by the declaration of the secretary, that it was not necessary to have his indorsement of the approval of the company of the assignment on the back of the policy. This left assured in the condition of having the policy terminated without the refunding of any portion of the premium paid in. Such a result, if permitted, would operate an obvious injury to the assured, and upon the principles above laid down it would be unjust to permit the defendant to have the benefit of this clause of the policy, he having, to the injury of the plaintiff, declared that it was unnecessary to comply with it on his part. When it is remembered that the blank form of approval printed on the back of the policy showed that the secretary of the company was the proper officer of the company to approve an assignment, the plaintiff cannot be considered as having acted otherwise than prudently when he, by his agent, called upon this secretary to know whether it was necessary to send the policy on for his approval of this assignment. And when he replied that it was not necessary, a sensible man might well take this to be so and believe that it was meant he should act upon it. I am, therefore, of opinion that

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this conduct of the secretary of the company estops them from relying on this breach of this condition of the policy. It is said, however, that the secretary did not make this statement to the plaintiff, and that the statement was made to a third party and that there is no evidence that it was ever communicated to the plaintiff. But the evidence shows that in making this assignment in a binding and effectual manner this party who is called a third person, to whom this statement was made, was really the plaintiff's agent. And, therefore, it must be held that the plaintiff not only knew of this statement but that his conduct was influenced by it. If, then, the first count in this declaration had been a count properly drawn and based on the policy, the evidence would under such a count have justified the finding of the court. But this count we have seen is fatally defective and the demurrer to it should have been sustained. The judgment of the court cannot, therefore, be permitted to stand unless the evidence would have justified the finding of the court under the second count, which is a common count of *insimul computassent*.

[This question being decided in the affirmative.]

Judgment affirmed.

NOTE BY THE REPORTER. — As to waiver of condition against over-insurance, see *Elliott v. Lycoming Co. Mut. Ins. Co.* (66 Penn. St. 22), 5 Am. Rep. 323. As to waiver of condition for payment of premium, see *Sims v. State Ins. Co.* (47 Mo. 54), 4 Am. Rep. 311; *Bodine v. Exchange Fire Ins. Co.* (51 N. Y. 117), 10 Am. Rep. 566; *Young v. Hartford Fire Ins. Co.* (45 Iowa, 377), 24 Am. Rep. 784; *Dayton Ins. Co. v. Kelly* (24 Ohio St. 345), 15 Am. Rep. 512; *Joliffe v. Madison Mut. Ins. Co.* (39 Wis. 111), 20 Am. Rep. 35. As to waiver of condition against change of title, see *Pratt v. N. Y. Cent. Ins. Co.* (55 N. Y. 506), 14 Am. Rep. 304. As to waiver of condition against other insurance, see *Couch v. City Fire Ins. Co.* (36 Conn. 181), 9 Am. Rep. 375; *Webster v. Phoenix Ins. Co.* (36 Wis. 67), 17 Am. Rep. 479; *Security Ins. Co. v. Fay* (23 Mich. 467), 7 Am. Rep. 670; *Allemaunia Fire Ins. Co. v. Hurd* (37 Mich. 11), 26 Am. Rep. 491; *Hayward v. Nat. Ins. Co.* (52 Mo. 181), 14 Am. Rep. 400. As to waiver of condition for limitation, see *Little v. Phoenix Ins. Co.* (123 Mass. 380), 25 Am. Rep. 96.

In this connection we note a recent case in the New York Court of Appeals, of which the following is an abstract: Defendant, by policy issued in 1869, insured the plaintiff's interest as owner in his dwelling-house. The policy was signed by the president and secretary, and "O. J. Hannon, Agent." It was renewed in 1870, and again in 1871, the renewal certificates being signed in the same way, and containing a clause, "not valid unless countersigned by the duly authorized agent of the company at Oswego, New York, and the last renewal was "countersigned at Oswego, the 11th of October, 1870, by O. J. Hannon, Agent." In November, 1871, plaintiff sold and conveyed the premises, and in 1872 applied for a renewal of the policy, telling Hannon the fact of the sale and showing him a mortgage on the premises which he had taken in payment, and Hannon said he would "make it all right," and gave him another like renewal certificate. Hannon received the premiums on the several renewals and forwarded them to the company. He did all the business of the company at Oswego except to settle losses. The policy contained provisions that it should be void if the premises should be sold, or if the interest of the assured was not truly stated, and that nothing less than a clear specific agreement, clearly expressed and indorsed on the policy,

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should operate as a waiver of any condition; and also that any person other than the assured, who might have procured the insurance to be taken, should be deemed the agent of the assured and not of the company, under any circumstances whatever, and in any transaction relating to the insurance. *Held*, that the conditions were waived. *Fish v. Ltu., London & Globe Ins. Co.*, 44 N. Y. 538; *Shearman v. Niagara Fire Ins. Co.*, 46 id. 596; *Bidwell v. North West. Ins. Co.*, 24 id. 308; *Rohrbach v. Germania Fire Ins. Co.* (62 N. Y. 47), 20 Am. Rep. 451, and *Alexander v. Same*, 66 N. Y. 464, distinguished and limited. There must be mutuality in the contract. If Hannon is to be deemed agent of the assured he cannot also be agent of the insurer, or if he is, the insurer must be bound by his acts and words, when he acts as one having authority from the insurer. *Pro hac vice* he then rightfully puts off his agency for the insured and becomes agent for the insurer. *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128. Defendant, by treating the former certificates, countersigned by Hannon, as valid, asserted that he was its duly authorized agent, and is estopped from denying his agency as to the third certificate. *Whited v. Germania Fire Ins. Co.*, decided March 12, 1879.

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(10 W. Va. 500.)

Insurance — adjustment — waiver.

The adjustment of a loss by an insurer, with full knowledge of all the facts, operates as a waiver of conditions in the policy against other insurance, and requiring the certificate of a notary as a preliminary to payment. (*See note, p. 601.*)

ACTION on a policy of fire insurance. The policy provided that it should be void in case of other insurance on the same property, without the consent of the defendant written on the policy. The opinion states the other facts.

W. H. Hogeman, for plaintiff in error.

Smith & Knight and *Mollohan & Fontaine*, for defendant in error.

GREEN, President. [After describing the policy and disposing of a minor question.] The plaintiff, in his declaration, alleged that "he had duly kept and performed all the requirements and conditions contained in said policy, and so continued from thence up and till the time of said loss." He also alleges, "that he did also produce and deliver to the defendant, at its office in the city of Wheeling, a certificate under the hand and seal of D. C. Gallaher, a notary public, nearest the place of said fire, and who was not concerned

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in any loss occasioned by said fire, as a creditor or otherwise, and not related to the plaintiff; that he, the said D. C. Gallaher, had examined the circumstances attending the loss sustained by plaintiff by said fire, and knew the character and circumstances of the plaintiff, and he verily believed that the plaintiff, by misfortune, and without fraud or evil practice, had sustained loss and damage on the property insured to the amount of \$1,428.41." The matters set forth above are, by the policy, required to be done by the plaintiff, but no penalty is attached to his failure to do this by the terms of the policy, except that the loss is not payable till these things have been done. The defendant demurred to the declaration, but has presented to this court no grounds on which his demurrer is based. And I see no defect in the declaration. The demurrer was properly overruled. The defendant then plead *non-assumpsit* and issue was joined; he also tendered a special plea in which he set forth the above provisions of the policy, requiring the consent of the company to be indorsed on the policy before any other insurance of the property could be made under the penalty of the policy being forfeited, and alleged that, "without the knowledge or consent of the defendant, the plaintiff did, after the issuing of the aforesaid contract or policy, and before the fire in the declaration alleged, make and obtain other insurances on the property in said contract or policy described, to wit: \$500 in the Nail City Fire Insurance Company, of Wheeling; \$700 in the Sunberry Fire Insurance Company, of Sunberry, Pennsylvania, and \$500 in the Franklin Insurance Company, of Wheeling." To the filing of which plea the plaintiff objected, and the court overruled his objection and permitted this plea to be filed; the plaintiff then offered three several special replications to the defendant's special plea. The first of these special replications alleged, substantially, that after the defendant had full knowledge of all the facts in his said plea alleged, and after said fire and before the institution of this suit, defendant and said three other insurance companies, jointly settled and adjusted said loss of plaintiff at \$1,428.41, and then and there apportioned said loss among said companies as follows: to the defendant, \$457.09 3-100; to the Nail City Fire Insurance Company, of Wheeling, \$285.68 5-100; to the Sunberry Fire Insurance Company, \$399.95 12-100; and to the Franklin Insurance Company, \$285.68 5-100. And the said defendant and said other companies agreed among themselves and with the plain-

tiff, that they would pay to the said plaintiff their portions of said loss as aforesaid, which the plaintiff agreed to receive and to discharge each of them from further liability, which agreement has been carried out as to all these companies, except the defendant, and it prays judgment, whether the defendant ought, contrary to said adjustment and agreement, to be admitted to say that said policy of insurance is forfeited and void. The second special replication set forth the same facts and adds the further allegation, that upon the happening of the loss, the three other companies became and were liable for the whole amount of said loss, independent and exclusive of the defendant's liability therefor. The third special replication set out the facts stated in the first, varying the statement only, by saying, that the plaintiff disputed the correctness of said adjustment and claimed that the true amount of said loss was largely in excess of \$1,428.41, and the said defendant and said three other companies, in consideration that the defendant agreed to abandon and waive his said claim to additional loss, and to accept and receive the amount so adjusted and apportioned, in full discharge of their, and each of their, liabilities on account of said loss, agreed then and there among themselves and with the plaintiff, that they would respectively pay to the plaintiff the portions of said loss, so respectively apportioned to them aforesaid, which agreement has been carried out and completed by all of said companies, except the defendant. These replications the court permitted to be filed, and the plaintiff took his bill of exceptions and then rejoined generally and issues were joined. On the trial of the issues, the jury assessed the plaintiff's damages at \$511.02, subject to the opinion of the court on the demurrer to the evidence which was filed by the defendant. The court held that the evidence was sufficient in law to maintain the issue joined on the part of the plaintiff, and it rendered a judgment in his favor for \$511.02, the damages assessed by the jury, with interest on same from January 2, 1876, the day the verdict was rendered, and costs. A writ of error was allowed to this judgment.

[Omitting a question of pleading.]

It remains, then, to inquire whether the acts referred to amount to a waiver on the part of the defendant of his right to rely on the provisions of the policy set up in his plea. The case of *Egan v. Aetna Fire and Marine Insurance Company of Wheeling*, 10 W. Va. 583, shows that a mere adjustment, if made with a knowledge of

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all the facts, amounts to a waiver of all defenses based on provisions in the policy. And such an adjustment is alleged in each of these special replications, and in addition thereto facts are alleged in each of them which make it still clearer that the defendant is estopped, if these facts are true, from setting up any such defense as his special plea proposes. One of these special replications alleges that by this adjustment the plaintiff released three other companies from the payment of the whole of his loss, which they would have been bound to do if the defendant had insisted on his right to avoid the policy he had issued. Another of these pleas alleged that the defendant had as a consideration for this adjustment surrendered a considerable portion of his claim for loss and damages not only against the defendant but also against three other companies. Acts of the defendant much more equivocal have been held a waiver of this provision in a policy. See *Webster v. The Phoenix Insurance Company*, 36 Wis. 56; 17 Am. Rep. 479; *Hayward, assignee, v. National Insurance Company*, 52 Mo. 181; 14 Am. Rep. 400.

[Omitting the consideration of the evidence.]

This evidence, it seems to me, on a demurrer to evidence by the defendant, establishes an adjustment, but it is unnecessary in this case to establish an adjustment. The policy itself is sued upon, and it was only necessary to prove a waiver of the provision of the policy, declaring a forfeiture on account of further insurance, without written consent of defendant, and of the provision requiring the notary's certificate to be returned with the proof of loss. The proof of loss was submitted to the secretary of the defendant, and indeed made out under his direction, a part of it being in his handwriting when returned. He did not object because the notary's certificate was not with it, but actually adjusted the loss to his own satisfaction. The paper made out under his direction, headed "Adjustment of Losses," stating on its face that the defendant pays to the plaintiff \$457.09 3-25; and he expresses regret that he could do no better for plaintiff. The law as stated above would unquestionably make this a waiver of the only matters which stood in the way of the plaintiff's recovery.

[Omitting the consideration of evidence.]

Judgment affirmed.

NOTE BY THE REPORTER. See *Stolle v. Aetna Fire and Marine Ins. Co.*, ante, p. 598, and note, ante, p. 597. To the same effect as to adjustment, *Illinois Fire Ins. Co. v.*

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Archdeacon (22 Ill. 236), 25 Am. Rep. 313, and *Little v. Phoenix Ins. Co.* (123 Mass. 380), 25 Am. Rep. 96, and note, 107.

In *Mason v. Citizens' Fire, Marine and Life Ins. Co.*, 10 W. Va. 572, the secretary of the company wrote the following letter to the insured:

"DEAR SIR: Mr. John Bishop, on his return to this city, handed us your proof of loss by fire which occurred on the 19th of January last in your place, showing the same to be \$1099.45; the policy No. 3047 of this company under which you had \$1,000 insurance, provides for other insurance by you—\$4,000 additional taken elsewhere—leaving this company liable for one-fifth your loss, which amounts to \$319.60. You will let us know if you desire the cash payment, and what discount you will allow this company to pay at this time, etc., etc." Held, a waiver of a condition that the company should not be liable until the premium was paid, and of the condition requiring proofs of loss in a specified manner, and the certificate of a notary to certain facts in connection with the loss. The court say:

"It is well settled that if premium is not required to be paid in cash, but is payable at a future time, and there is a provision in the policy rendering it void, or terminating it if the premium is not paid promptly at maturity of premium note, or if the premium be recited on the face of the policy to have been paid in cash, but instead thereof, a note be taken which on its face declares the policy will become void if the note is not paid promptly at maturity, or if the policy on its face declare in such cases, that if any obligation for premium be not paid promptly, the policy in any such case shall terminate or be void, such provision of the policy will be enforced unless waived and the mere delivery of the policy is not a waiver by the company of such provision. *Muhleman v. National Insurance Company*, 6 W. Va. 508; *Bradley v. Potomac Fire Insurance Company*, 23 Md. 108; 3 Am. Rep. 121; *Pitt, adm'r, v. Berkshire Life Insurance Company*, 100 Mass. 500; *Baker v. Union Life Insurance Company*, 43 N. Y. 233; *Bowditch Mutual Fire Insurance Company v. Winslow et al.*, 3 Gray, 432."

"The weight of authority, as well as sound reason, leads to the conclusion that the delivery of the policy to the assured is necessarily a waiver of such a provision in the policy. Thus, in *Wood v. Foughkeepsie Mutual Insurance Company*, 32 N. Y. 619, it was decided that the condition of a policy of insurance that the instrument should not be binding until actual payment of the premium is waived by the company delivering the policy without exacting prepayment. But not if it is merely left for examination with the assured, if the party is required, if he concludes to accept the policy, to prepay the premium. The assured, if the policy is delivered to him, has a right to hold the company to its contract of insurance, despite this provision in the policy, but the company would have a right to sue for the premium despite the acknowledgment of the receipt. In *Bochen v. Williamsburgh Insurance Company*, 35 N. Y. 131, the court decided that the delivery of a policy without requiring such pre-payment in the policy. This position, too, is strongly countenanced by the Supreme Court of the United States in *Miller v. Life Ins. Co.*, 13 Wall. 288. The delivery of the policy to the assured is an act utterly inconsistent with a provision in it that it shall have no effect, the premium not having been paid, and being so, upon principle it must be held to be a waiver of such provision. Of course, if the policy was handed to the assured merely to inspect, this does not amount in law to a delivery, but if once delivered as a contract, a provision in it that it shall be void till the cash payment is made, is by the mere delivery waived. Even if the premium had not been cashed, but by the terms of the policy to be paid at a future time with a condition that the policy should be void if such future payments were not promptly made, such provision could be waived by the company, and an adjustment of the liability would be a sufficient waiver. See case of *Egan v. Aetna Fire and Marine Insurance Company of Wheeling*, 10 W. Va. 563, and so would the receipt of the premium subsequently. *Bouton v. American Mutual Life Insurance Company*, 35 Conn. 542; *Wing v. Harvey*, 27 Eng. Law & Eq. 140; *Buckles v. U. S. Ins. Trust Company*, 18 Barb. 541."

In *Egan v. Aetna Fire and Marine Ins. Co.*, 10 W. Va. 563, the same force was given to an adjustment as a waiver of non-payment of premiums, and it was further held to operate as a waiver of a condition avoiding the policy if the building stands on leased ground and that fact is not represented and expressed in the policy, the company being cognizant of the fact when the adjustment is made. The court say:

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"The next inquiry is whether the policy being void by reason of the building insured being upon leased ground, does this render void the alleged adjustment of the damages to be paid to the plaintiff by the defendant, the agents of the defendant having full knowledge of all the facts when they made the adjustment? In other words, does their ignorance of the law as to the rights and responsibilities of the parties render the adjustment made by them void? I am of opinion that it does not. If a party, through ignorance of fact, has either paid money or promised to pay money for which he was not liable under the supposition that he was liable, he may recover it back in the one case, or refuse to fulfill the promise in the other. *Goodall v. Dolley*, 1 T. R. 712; *Williams v. Bartholomew*, 1 B. & P. 327; *Donaldson v. Means*, 4 Dall. 109; *Crain v. Caldwell*, 8 Johns. 384; *Garland v. Salem Bank*, 9 Mass. 408. But ignorance of law, the facts being known, furnish no ground for the recovery of money which has been voluntarily paid, or for avoiding a promise to pay. *Stevens v. Lynch*, 13 East, 38; *Lundie v. Robertson*, 7 id. 231; *Bibbie v. Lumley et al.*, 2 id. 469; *Lowry v. Bourdieu*, Doug. 468; *Duryee v. Dennison*, 5 Johns. 248. These principles were approved and applied to a case of an adjustment made by an insurance company, in *Dow v. Smith*, 1 Cal. 32. We see no reason why they should not be as applicable to an adjustment made by an insurance company with full knowledge of the facts as to a promise by an individual to pay any debt for which he supposes himself responsible in law, he knowing when he makes the promise of all the facts."

STATE V. CHARLTON.

(11 W. Va. 332.)

Indictment — uncertainty — disjunctive conjunction.

An indictment charging in the words of the statute, the sale of intoxicating liquor, without a license, "to be drunk in, upon or about the building or premises where sold," is bad for uncertainty.

INDICTMENTS for selling at retail intoxicating liquors "to be drunk in, upon, or about the building or premises where sold, without obtaining State license therefor according to law." Demurrers. Conviction.

Attorney-General, for the State.

Robert McConnell, for Charlton.

Hanson Criswell, for Allum.

GREEN, President. The question for consideration in these cases is: Should the court on demurrers to the indictments severally have sustained the indictments as sufficient? The indictment in charging the offense uses the language of the statute, see chap. 99, § 1, of Acts of 1872-3, p. 253. In indictments it is generally proper

and sufficient to describe the offense in the very terms used by the statute for the purpose. *Young's case*, 15 Gratt. 666; *Burner's case*, 13 id. 778. To this general rule there are exceptions. Thus in some cases it is necessary for the allegation in the indictment to go beyond the words used in the statute; numerous examples are given of this in Bishop's *Crim. Proc.*, vol. 1, §§ 369 to 374, of which it is unnecessary to speak. An instance, however, where the words of the statute ought not to be used, though not properly an exception to this general rule, exists which I will specify, as it bears directly on the validity of the indictments in the cases before us. Where a statute, on which an indictment is founded, enumerates the offenses or intent necessary to constitute the offenses disjunctively, the indictment is fatally defective, which uses the words of the statute charging them disjunctively. See Wharton's *Crim. Law*, vol. 1, § 295; 1 Bishop's *Crim. Proc.*, § 334. Thus in *Angell's case*, 2 Va. Cas. 231, it was held that where the statute said, "whoever shall unlawfully shoot or stab another, with intention to maim, disfigure, disable or kill, shall be," etc., the indictment was properly drawn which charged the act done "with the intention to maim, disfigure, disable and kill," and that the party on such an indictment should be found guilty, if his intention was only to maim, disfigure and disable and not to kill. If this indictment had followed the words of the statute, it would have been bad, for it would have violated the well-established rule that an indictment must state the offense disjunctively, when it is thereby left uncertain what was really intended to be relied on as the accusation. The question for consideration in the cases before us is, do the indictments in these cases violate this well-established rule? It is uncertain from these indictments whether the State meant to rely upon the selling by the accused of intoxicating liquors at his house to be drunk in the building, or whether it meant to rely upon the selling of intoxicating liquors by the accused at his house to be drunk upon the premises. That is not in the building, but upon the lot adjacent to his house? It is insisted by the attorney-general that the indictment shows that the State meant only to rely on the accused selling intoxicating liquor in his house, that the words building and premises, as used in the indictments, meant the identical same thing, and that the expression building or premises, as used, meant the same as building, to wit: premises; the word premises meaning the same as the preceding word building,

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If this be the true interpretation of the words used in these indictments, then they are clearly valid, there being no legal uncertainty as to what accusation the State relied upon. See *Commonwealth v. Grey*, 2 Gray, 501; *Bronn v. Commonwealth*, 8 Mass. 59. If, however, the statute, chap. 99, § 1, of Acts of 1872-3, p. 253, intended to punish not only the selling of liquor in the building where sold, but also upon the premises adjacent to said building, then this indictment which uses the identical words of the statute, must be interpreted in the same manner. The meaning of this act seems to me clear, the language is "in, upon or about the building or premises where sold." The natural meaning of this is "in the building where sold, or upon or about the premises adjunct to the building where sold." If the word premises meant in this statute or indictment, the same as building, then we construe the act and indictment as though it read "to be drank upon the building where sold," a construction which seems absurd. That the legislature by this act intended to punish the selling without license, of intoxicating liquor to be drank not only in the building, but "upon the premises adjunct thereto," appears from the further prohibition immediately following: "his selling such intoxicating liquor in any adjoining room, building or premises, or other places of public resort connected with the said building."

The attorney-general relies, to sustain these indictments, on the cases of *Cunningham v. State*, 5 W. Va. 508, and *Morgan's case*, 7 Gratt. 592, where it was held not to be error to charge the offense of selling spirituous liquors, wines, etc., without license, by using the word "or" in lieu of "and" in describing the various kinds of liquors and drinks, charged in the indictment to have been sold without a license. In reference to these cases it is to be observed, that Judge BERKSHIRE, in delivering the opinion of the court in the first of them, says in reference to this objection to the indictment, "if this were an open question, I am disposed to think there would be much force in it. But in *Morgan's case*, 7 Gratt. 592, it was held that it was no error to use the word 'or' (as in this case) instead of the word 'and' in describing the various kinds of liquors and drinks, charged to have been sold in the indictment. That case therefore must be conclusive of the present case." The court in *Morgan's case* cited no authorities and expressed no opinion, simply affirming the judgment below. And Bishop in his *Criminal Procedure*, vol. 1, § 337, says that this case is contrary to

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the general doctrine. The contrary has been held elsewhere. See §§ 3, 36, and authorities there cited. It may be perhaps that the indictment in *Morgan's case*, 7 Gratt. 592, was held good, because it might have been considered that, as the State could not reasonably be required to allege or prove the particular kind of spirituous liquors sold, it ought not to make an indictment bad for uncertainty, to allege that it was of one kind or another. If this was the ground of this decision, it would be inapplicable to the cases now under consideration, as the State could without any difficulty show, and ought therefore to allege, whether the liquor was sold to be drank in the building, or on the premises adjunct to the building. But be the reason what it may, for the decision in *Morgan's case*, it ought not to be regarded as overthrowing the general rule, that an indictment ought not to state the case disjunctively, when it is thereby left uncertain, what is really intended to be relied on as the accusation. And while *Morgan's case* must govern us whenever a case like it arises, yet we cannot safely extend it to cases which differ from it and fall within this general rule.

The judgment of the Circuit Court in each of these cases must therefore be reversed and annulled; and this court proceeding to render such judgment, as the Circuit Court should have done, doth reverse and annul the judgment of the county court, and doth sustain the demurrers to the indictments in each of these cases, and doth order that the defendants, Absalom Charlton and William Allum, severally go quit of the offenses, charged against them in said indictments severally.

Judgments reversed.

STATE V. STRAUDER.

(11 W. Va. 745.)

Removal of cause to Federal courts — colored prisoner — jury from which colored persons are excluded.

A colored man cannot remove an indictment against him into the Federal court for trial, upon the allegations that such prejudices exist against his race in the State that justice will not be done him, and that none but white men can there sit on the jury.

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INDICTMENT and conviction of murder. The prisoner petitioned for the removal of the indictment for trial to the United States Circuit Court, alleging that he was a person of color and an emancipated slave; that his defense would depend greatly on the fact of his marriage at the time of the alleged offense; that there was a general impression in that county and State that colored men were not entitled to the same protection in their marital relations as white men; that no colored man was eligible under the State law to serve on a jury; that he believed that he could not have the same benefit of law that white citizens enjoy, and feared a denial of his rights, etc. The petition was refused.

Davenport & Dovenor, for the prisoner.

Attorney-General, for the State.

GREEN, President. [Omitting all other points.] The third error assigned is, that "the court should have granted the prayer of the prisoner to have his cause removed to the Circuit Court of the United States."

The Revised Statutes of the United States, section 640, under title 13, chapter 7 (see Rev. Stats. of U. S. p. 114), provide among other things "when any criminal prosecution is commenced in any State court against any person who is denied, or cannot enforce, in the judicial tribunal of the State, or in that part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such prosecution may, upon the petition of such defendant filed in said State court at any time before the trial, stating the facts, and verified upon oath, be removed for trial in the next Circuit Court to be held in the district where it is pending." And section 1977 of the Revised Statutes of the United States under 24th title "Civil Rights," p. 348, provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and executions of every kind and to no other.

The authority of the Congress of the United States to pass these acts is claimed under the thirteenth and a portion of the fourteenth amendments of the Constitution of the United States, which are in these words: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party has been duly convicted, shall exist within the United States at any place subject to their jurisdiction." And "all persons, born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And under a general provision applying to both the fifteenth and fourteenth amendments "Congress shall have power to enforce the provisions of this article by appropriate legislation."

Before considering the question whether the court erred in refusing to remove this case to the Circuit Court of the United States on the application of the prisoner, I will consider the true meaning of these amendments of the Constitution, and the acts of Congress passed, as is claimed, by the authority. And first I will consider the question what is the meaning and scope of these amendments of the Constitution. If they do not authorize Congress to legislate, so as to give jurisdiction to the Federal courts in such a case as is presented, it will be useless to go further and consider whether the acts of Congress cited intended to permit the Federal courts to take jurisdiction; for if these amendments to the Constitution do not confer on Congress the power so to legislate, such legislation is unauthorized and void, being unconstitutional. What then is the true interpretation of the first section of the fourteenth amendment of the Constitution above quoted, it being the only one which really has any bearing on the question under discussion? This first section is divided into four clauses; the first is: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." The evident object of this clause was to settle forever a question, which for many years had been the subject of bitter controversy: whether every person born in the United States and subject to their jurisdiction was a citizen. In the case of *Dred Scott v. Sandford*, 19 How. 393, the Supreme Court of the

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United States decided that a negro, though he might be a freeman, was not and could not be a citizen. This decision, though disapproved by many lawyers, had never been overruled. By this decision the whole negro race were not only not citizens, but were incapable of becoming so, except by an amendment of the Constitution of the United States. To remove this difficulty was the object of the first clause above quoted; and it was obviously the principal, if not the whole object of the entire first section of the fourteenth amendment of the Constitution of the United States; the other clauses, as we shall presently see, were principally intended to insure the carrying out of this clause to its full extent; and if they add any thing to its force or scope, such addition is very small and practically amounts to nothing. It is true that SWAYNE, J., in the case of the *United States v. Rhodes*, decided in February, 1868, by the Circuit Court of the United States for the district of Kentucky, and reported in the *American Law Times Reports*, vol. 1, p. 23, had decided that all persons born in the United States, and subject to their jurisdiction, were citizens; and Congress had, by the act of April 6, 1866, so expressly declared. But as this act of Congress and decision of the Circuit Court of Kentucky were in direct opposition to the decision of the Supreme Court of the United States in the *Dred Scott case*, it was wisely considered that neither this act of Congress, nor this decision of Judge SWAYNE, would ever be acquiesced in as setting aside a solemn and well-considered decision of the Supreme Court of the United States. And hence the passage of the fourteenth amendment of the Constitution of the United States. The next clause of this amendment is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." This was really no new provision in the Constitution of the United States; a provision was already in the Constitution, which, in effect, and almost in words, corresponded with this clause. The first clause in the second section of article four of the Constitution provides: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." It is obvious on inspection, that the only change made by this second clause is to insert instead of "citizens of the several States," in the fourth article, the words, "citizens of the United States." The object in making this change of phraseology is obvious. It was not thereby intended to confer on anybody, any new rights, privileges or

immunities. It had been said by eminent judges, that no man was a citizen of the United States, unless he were a citizen of one of the States of the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided by the Supreme Court of the United States. A great controversy had been carried on by statesmen as to the character of the government of the United States, and whether any allegiance was due from the people directly to the United States, or whether their allegiance was due only to the States severally. In view of these difficulties, it seems highly probable that this change of words, the substituting of "citizens of the United States" for "citizens of the several States," was made to have its effect on these mooted questions. It is unnecessary to determine what effect, of this character, they may have. Its effect, if any of this sort, is a political effect; and a case can hardly arise in which it can become proper for the courts to express an opinion upon its effect in this respect. We can, however, with great confidence say, that this change of phraseology can have no effect whatever on the rights, immunities or privileges of any person whatever. The first clause of the 2d section of article 4 of the Constitution expressly confers on the citizen of each State all the privileges and immunities of citizens of the several States. And this is all the effect of this provision of the 1st section of the 14th amendment, so far as it operates on the immunities and privileges belonging to any person. By denying to the States the right to abridge the immunities of the "citizens of the United States," was evidently meant the denying to a State the right to abridge the immunities of persons having permanent residences in other States, or in the Territories, as distinguished from citizens of the State. The rights of the States over its own citizens was not intended to be changed by this amendment of the Constitution; and a State may now deny to any of its own citizens any rights and immunities whatever, excepting only such as are protected from violation by express provision in the Constitution of the United States. These rights and immunities thus protected are but few, and are specifically enumerated; as for instance, the right to have one's contract enforced, which is protected by the provision that no State shall impair the obligation of contracts. It is true that the Congress of the United States, in the passage of

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the Civil Rights Act, before quoted, evidently assumed that this 14th amendment had conferred on the United States powers far beyond those, which this interpretation would confer; and that the States were by this 14th amendment restricted to a great extent in their power of denying to their own citizens rights and immunities which had theretofore been considered under the control and protection of the State governments. It is also true that certain of the judges of the Circuit Courts of the United States under unfavorable surroundings, and at times when their judgment was warped by the general condition of the country, have given to this constitutional amendment, and especially this clause, a far wider scope than I have indicated. But the Supreme Court of the United States has disapproved of such broad construction of this amendment, and has, with constantly increasing clearness, declared these constructions, whether made by circuit judges, State courts, or Congress, were unjustifiable. Their most recent decisions approximate closely to the views I have above expressed. A few examples of these perverted views of this amendment, repudiated by the Supreme Court of the United States, will be cited. Thus in the case of *The State v. Dunlap*, 65 N. C. 491; 6 Am. Rep. 746, it was held that "an affidavit by a colored man in a criminal case pending in a State court, setting forth, in substance, that by reason of his color and previous condition of servitude he could not obtain justice in the courts of his State, entitled him to have his case removed into the United States Circuit Court." In examining this case, it will be observed that the colored man was indicted for murdering a white man, as his petition set forth; he also stated in it that at the time of the alleged homicide a systematic effort was made by divers persons, members of the democratic party, to produce the impression that the murdered man was killed by the prisoner, and that in killing him he was actuated by political motives; that the officials by whom the jury would be formed were all democrats; that a colored man was seldom on the jury, which would be composed almost entirely of democrats; and under these circumstances he could not obtain justice in the State courts. It is obvious that the circumstances surrounding this case were exceedingly unfavorable for obtaining a fair and impartial construction of the Constitution or law; and it is therefore not surprising that Chief Justice PEARSON decided as he did. But we had a right to expect him, in rendering such a decision, to make some sort of reference

to the Constitution of the United States, and not content himself, as he did, with construing the 3d section of the act of Congress of April 9, 1866, which confers exclusive jurisdiction upon the courts of the United States in all cases, civil and criminal, affecting persons who are denied or *cannot enforce* in the State courts, any of the rights secured by the first section of that act, among which is the full and equal benefit of all laws and proceedings for the security of persons and property. Had he examined it he would have found that the Constitution not only did not authorize the Congress to permit the interference of the Federal courts, because the laws of a State would not be fairly enforced against citizens of the State, because of prejudice, but equally forbade such interference when the State laws on their face made discriminations against certain of its own citizens; and permitted such interference only when the State laws on their face improperly discriminated against residents of other States, even though they might be sojourning in the State. Such a decision as was rendered by Judge PEARSON may be apologized for by referring to the times in which it was rendered, but can never be justified, much less followed. So, too, in the case of *United States v. Rhodes et al.*, decided by the Circuit Court of the United States, for the district of Kentucky, in February, 1868, reported in the *American Law Times Reports*, vol. 1, p. 23, Judge SWAYNE decided that the civil rights law of April 6, 1866, was agreeable to the 13th amendment of the Constitution of the United States abolishing slavery, and empowering Congress to enforce the same by appropriate legislation; and that Congress had rightfully thereunder given to colored persons the same right to testify as is enjoyed by white citizens, and had also given to the courts of the United States jurisdiction of all causes, civil and criminal, which concern the colored man, whenever the right to testify equally with white men is denied him. The judge in this decision did not, like Judge PEARSON, omit to take notice of the Constitution of the United States. To reach his conclusions, as the 14th amendment of the Constitution had not passed, he had first to overrule the decision of the Supreme Court of the United States in the *Dred Scott case*. He then had to decide that the words "civil and criminal causes" in the Civil Rights Act did not mean "civil and criminal cases," but causes or matters, out of which cases arose. This construction was necessary, or otherwise he would have had likewise to have

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overruled the decision of the Supreme Court in *The United States v. Ortega*, 11 Wheat. 467; but this nice distinction is overruled by the Supreme Court of the United States in the case of *Blyew v. United States*, 13 Wall. 581; and the decision of Judge SWAYNE, in *The United States v. Rhodes*, which was cited in that case, was expressly overruled, the entire court concurring in this conclusion, excepting only BRADLEY and SWAYNE, who dissented. This decision of the Circuit Court of Kentucky is worthy of consideration as one showing in a remarkable degree the extent to which the judicial mind may be warped by the times and circumstances under which cases are considered. It was rendered before the passage of the fourteenth amendment. And it is difficult to conceive how the amendment abolishing the institution of slavery could possibly have been considered as restricting the rights of the States over any freeman. It left, of course, the rights of freemen exactly where they formerly were, and only declared that all persons should have these rights; but the power of the States and of the Federal government over the rights of freemen were not, and could not be affected by the thirteenth amendment; yet it was held in this case that this thirteenth amendment authorized Congress to pass a law, in effect nullifying a law of Kentucky, whereby colored men could not testify against white persons. Such laws existed in many States, and no one had ever questioned the right of the legislatures to pass them. The Constitution of the United States had in no way prohibited such legislation by the States and all had admitted the right of the States to legislate on this subject as they chose. The thirteenth amendment conferred no rights on any freeman, and could not therefore possibly affect the rights of the State to legislate on this subject. And the act of Congress, so far as it interfered with the acknowledged right of the States, was unconstitutional and void. But Judge SWAYNE held otherwise. He held that the simple abolition of slavery by the Constitution conferred on Congress the right to treat as nullities the laws of the States passed with reference to freemen. If Judge SWAYNE was right, it was worse than useless to pass the 1st section of the 14th amendment of the Constitution of the United States; for Congress already had all the powers and greater powers than are conferred on it by this section. Even since the passage of the 14th amendment, it had been decided that a State has a right to exclude from testifying in its courts any class of its inhabitants or citizens that it chooses. Thus in

California, by statute, Chinese are not permitted to testify for or against white persons; and the Supreme Court of California has decided that this law is not in violation of the 14th amendment of the Constitution of the United States. See *People v. Brady*, 40 Cal. 198; 6 Am. Rep. 604.

In *Hobb's case*, decided September, 1870, in the District Court of the United States, for the northern district of Georgia, reported, 4 Am. L. T. R. 190, Judge ERSKIN held that a State law prohibiting marriage was not repugnant to the Civil Rights Bill, marriage not being a contract within the meaning of the Civil Rights Act, and he held further, that such a law was not in conflict with the 14th amendment of the Constitution of the United States, though he gave a much more comprehensive meaning to that amendment, than is given by some of the State courts, and by the Supreme Court of the United States. Thus, in delivering the opinion in that case, he says that the first clause of the 2d section of article 4 of the Constitution of the United States applies to citizens removing from one State to another; while he seems to think that language, which we have seen is in substance the same, and almost in the same words, when used in the 14th amendment has a much broader meaning and includes permanent residents of the State as well as citizens of other States. This view, however, has been repudiated, not only by the Supreme Court, but by State courts. Thus the same decision, in reference to the constitutionality of a State law prohibiting marriage between white persons and negroes, was made by the Supreme Court of Indiana, in the *State v. Gibson*, 36 Black, 389; 10 Am. Rep. 42, decided in 1871. But this decision is based upon much more satisfactory reasoning. The conclusion reached by that court, after a careful consideration of the whole subject, is that the 14th amendment of the Constitution of the United States has not in any manner, or to any extent, impaired, weakened or taken away any of the reserved rights of the States, as they had existed and been fully recognized by every department of the National government from its creation; it conferred citizenship upon all persons born in the United States, and subject to their jurisdiction, and it did no more. These views have, to a large extent, met the approval of the Supreme Court of the United States. In the *Slaughter House case*, 16 Wall. 36, the legislature of Louisiana had conferred on The Crescent City Live Stock, Landing and Slaughter House Company certain exclu-

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sive privileges, denied to other citizens of Louisiana, which was regarded an oppression and unjust to them, and raised the question: whether since the passage of the 14th amendment of the Constitution of the United States, "can any exclusive privileges be granted to any of its citizens or to a corporation by the legislature of a State?" It was insisted that such an act was a violation of the 13th amendment of the Constitution of the United States, as it created "an involuntary servitude." The court in its opinion, delivered by Justice MILLER, says (page 69): "To withdraw the mind from the contemplation of the grand and simple declaration, of the 13th amendment, of the personal freedom of all the human race within the jurisdiction of this government, and with a microscopic search, endeavor to find in it a reference to servitudes, which may have been attached to property in certain localities, requires an effort, to say the least. That a personal servitude was meant is proved by the use of the word, 'involuntary,' which can only apply to human beings." The court deemed it unnecessary to say any thing more upon the application of this article of the Constitution to the Louisiana statute; the thirteenth amendment of the Constitution, in their judgment, evidently had no bearing on the case. The court, in considering the meaning and effect of the fourteenth amendment of the Constitution, says: "That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation, children of ministers, consuls and citizens, or subjects of foreign States, born within the United States," page 73; with reference to the next clause the court says: "The language is, no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States. It is a little remarkable, if this clause was intended as a protection to a citizen of a State against the legislative power of his own State, that the words, 'citizen of the State,' should be left out, when it is so carefully used, and used in contradistinction from 'citizens of the United States,' in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose." The Circuit Court of Northern Georgia, in the case above cited, seems to have lost sight of what seems so clear to the Supreme Court. The conclusion of the Supreme Court is, that "the privileges and immunities belonging to citizens of a State, as

such, must rest for their security and protection where they have heretofore rested ; for they are not embraced by this paragraph of the amendment," and again it says: "with very few exceptions, the entire domain of the privileges and immunities of citizens of the States lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States* to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And when it is declared that Congress shall have power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this must follow from the construction insisted upon. Such construction would constitute this court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with these rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive, which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and prevailing, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other, and of these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt."

The next clause of the first section of the fourteenth amendment is: "Nor shall any State deprive any person of life, liberty or property without due process of law." The court in reference to this says: "this paragraph has been in the Constitution since the passage of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the Constitutions of nearly all the States, as a restraint upon the pow-

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ers of the States. This law then has practically been the same as it now is, during the existence of the government, except so far as the present amendment may place the restraining power over the States, in this matter, in the hands of the Federal government." It is held by the court that this provision could, in no manner, affect the question under consideration.

The only remaining clause in this first section of this fourteenth amendment of the Constitution is: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws." Upon the true meaning of this clause, the Supreme Court of the United States, in the *Slaughter House case*, says but little; they seem to regard it as obvious that the case before them, the giving of exclusive privileges to some citizens of a State, by a State law, which was denied to others, was no violation of this provision; and that its operation and effect would probably be confined to very few cases; they use language which implies that it ought probably to be confined to the single case of legislation directed against negroes as a class. The language used is: "We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clear a provision for that case and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave the matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands." I can see no reason why the court should have considered that under this provision of this amendment, "it was a State that was to be dealt with, and not alone the validity of its laws," any more than under the preceding paragraph, which provides that "No State shall deprive any person of life, liberty or property, without due process of law," or any more than under numerous other provisions of the Constitution, such as those contained in the tenth section of article one, where it is said no State shall do a number of things enumerated — all these restrictions on the powers of the State have, so far as I know, been enforced simply by regarding acts, done in violation of these provisions, nullities; and I see no reason why the provisions of the fourteenth amendment of the Constitution should not be so construed and enforced. Again, the

court seems to think a much stronger case of unjust discrimination by a State against any class of its inhabitants, such as Chinese, Catholics, Mormons, naturalized foreigners or women would be required to be made out, before a case could come within the purview of this provision in the fourteenth amendment, than would have to be made out if the discrimination were against negroes. I cannot believe that the States, which adopted this amendment, designed thereby to secure to the negroes any rights or privileges, that were not equally secured to all others. It is true that the occasion for this provision and all the other provisions of the thirteenth and fourteenth amendments was the supposed necessity of protecting the negro; but special care was taken to extend these provisions to all persons whatsoever. The language is as broad as it possibly can be: "No person shall be denied the equal protection of the laws." A Chinaman or a naturalized foreigner or Roman Catholic is obviously, under this provision, entitled to this equal protection of the laws to the same extent as a negro; and though the Supreme Court has used this language, I cannot believe, when the case arises, that they can, or will, in any decision they may render, discriminate against others in favor of the negro. If they had held the law of Kentucky, forbidding a negro to testify for or against a white person, unconstitutional, they would assuredly have held the law of California, prohibiting a Chinese to testify for or against a white person, also unconstitutional. From the general tenor of the decisions of the Supreme Court, it is fair to conclude that they regard the position taken by the Supreme Court of Indiana, if not entirely sound, as substantially so; and that the thirteenth and fourteenth amendments of the Constitution of the United States have little or no other effect, than to abolish slavery and declare a negro a citizen, when born in the United States; and that the powers of the State legislatures over the civil rights, privileges, duties, or immunities of any and all of its citizens, whether negroes or whites, remain as they always were; and that no power with reference to these rights is conferred by Congress on the Federal judiciary. This decision of the Supreme Court has since been followed up by others, based on the same views of the meaning of these amendments of the Constitution. Thus in *Bradwell v. The State*, 16 Wall. 130, the court decided that the decision of the Supreme Court of Illinois, that a woman resident in Illinois ought to be refused a license to practice law in the courts of that State, by the law of that State, was no viola-

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tion of the 14th amendment of the Constitution of the United States, basing that decision on the broad ground that, no matter what laws a State may pass relative to its own citizens, their rights or immunities, such law would not violate this amendment of the Constitution ; and on these principles, any State could prohibit a Chinese or a negro, or a white man, resident in the State, from practicing law or sitting on a jury, or giving evidence in its State courts. In the same spirit, the 3d and 4th sections of the act of May 31, 1870 (16 Stat. 140), providing for the punishment of State officers of election and others, was pronounced unconstitutional by the Supreme Court, in the case of the *United States v. Reese et al.*, 2 Otto, 215, the same not being regarded as "appropriate legislation," within the meaning of the fifteenth amendment of the Constitution. And in the *United States v. Cruikshank*, id. 542, the Supreme Court decided that the fourteenth amendment of the Constitution of the United States prohibits a State from depriving any person of life, liberty or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws ; but it adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against the encroachment by the States upon the fundamental rights, which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there.

I will follow the example of the Supreme Court of the United States in the *Slaughter House cases*, 16 Wall. 81, and not undertake to state my views of the cases, to which the last clause of the first section of the fourteenth amendment may apply, till some case arises of oppression of the State, by the denying of equal protection of the laws to some person within its jurisdiction ; and content myself, as they did, with saying that we find no such case in the one before us. For this is obviously no such case. The prisoner has not been denied the equal protection of the laws of West Virginia. It follows from the case of *Blyew v. The United States*, 13 Wall. 581, that in the opinion of the Supreme Court, the prisoner could not be regarded as being denied the equal protection of the laws, if white persons had been, as they were, permitted to testify against him, even if our State laws had prohibited, which they do not, a negro to testify in an exactly similar

case against a white prisoner on trial. And surely if this be the case the mere prohibition of negroes to sit upon the jury which tried him cannot be regarded as the denial of equal protection of the laws to him. The negro has no more right to insist upon the equal protection of the laws than a Chinaman or a woman. And surely it will not be pretended that a State, which by its laws prohibits a Chinaman or a woman from sitting on a jury, does thereby deny to a Chinaman or woman who is being tried for a felony the equal protection of the laws. Has not a woman as much right to insist that a State, by its laws, must permit her to be defended by a woman as her counsel, as she has to insist that women should be allowed to sit on a jury which tries her? And yet the Supreme Court of the United States decided in the case of *Bradwell v. The State*, 16 Wall. 130, that a State has a right to prohibit women from acting as counsel in any case. I agree with the Supreme Court in the *Slaughter House cases*, that it is doubtful whether in the future any action of a State is likely to occur which will ever be held to come within the purview of this last clause of the first section of the 14th amendment, prohibiting a State to deny to any person the equal protection of its laws. But I cannot think that a State is likely to bring a case within the purview of this provision by discriminating against the negro in such manner as to deny to the negro the equal protection of the laws, as it has been heretofore interpreted. And as I have before said, I believe the interpretation of this provision ought and must be the same, whether applied to negroes, Chinamen, women or other persons. I know of no State law which has been passed since the adoption of this amendment of the Constitution which violates it by thus discriminating against negroes; and though there have been some State laws, even in our own State, which would perhaps be regarded as violating this provision of the Constitution of the United States, yet they were directed not against negroes but against white persons. They have, however, been repealed, and it is not likely that such acts will ever be again passed by any State. It is confidently believed that no such acts will be ever again enacted in this State. An example of this sort of legislation may be found in the act passed February 28, 1865, and re-enacted in the Code of West Virginia of 1868. See Code of West Virginia, chap. 136, §§ 10, 11; 12 and 13, page 645. This act prohibited any person who had abetted the Confederate States from suing a per-

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son who had remained loyal to the government of the United States.

The views I have expressed show clearly that in the case before us the Circuit Court did not err in refusing to order the removal of this case to the United States court for trial. The prisoner in his petition based his application for such removal on two grounds: First, because a false impression prevailed throughout the State of West Virginia that colored men are not entitled to the same protection in the marital relation as white men. This amounts to an allegation that prejudices exist in this State relative to negroes that would injuriously affect him if he were tried before the State courts. It is obvious from what has been said that in my opinion this gives him no right to have the trial of his case removed to the Federal court. If it did, any citizen of this State, white or black, could at his pleasure on affidavit remove any case, civil or criminal, from the State to the Federal courts. The other ground, alleged in the petition for the removal of the cause to the Federal court, is that under the laws of West Virginia none but white persons are allowed to serve as jurors, and therefore, he, being a negro, has not the equal protection of the laws. We have seen that in the trial of a citizen of this State for an offense committed in the State against her laws, the prisoner could in no case have a right to have the trial removed to the Federal court, the fourteenth amendment not being intended to protect the citizens of any State against unjust legislation by their own State. In the particular case before us I cannot see why a jury of white men would not be quite as likely to do justice to the prisoner as a jury of negroes; but if it were otherwise, it would give him no right to have his case removed to the Federal court for trial.

HAYMOND, MOORE and JOHNSON, JJ., concurred.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

JOHNSTON V. COMMONWEALTH.

(88 Penn. St. 54.)

Criminal law — burglary — constructive breaking.

The prisoner, pretending to have business with the occupant of a dwelling house, gained admittance thereto at night, with intent to commit a robbery *Held*, a constructive breaking sufficient to support an indictment for burglary by breaking and entering.

INDICTMENT for burglary and entering with intent to steal. Conviction. The opinion states the facts.

J. McDowell Sharpe, and *Duncan & McGowan*, for plaintiff in error.

O. C. Bowers, district attorney, and *Kennedy & Stewart*, for the Commonwealth.

PAXSON, J. [Omitting a minor point.] Without going into extended details, there was abundant evidence to show a conspiracy between the defendant (plaintiff in error) and his confederate, Rolland, to rob the bank. This design had evidently existed for a period of some weeks, and the plan carefully arranged. There were well-matured preparations for disguise and flight; masks and

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gowns, and a horse saddled, and kept waiting near at hand; a pistol and dirk for defense or attack if necessary, and gags to silence those who might be in the bank. There was a completeness of preparation that marks the experienced and accomplished burglar. This was especially the case with Rolland, who appears to have cultivated pleasant social relations with many of the citizens of Chambersburg, and particularly with Mr. Messersmith, the cashier of the bank intended to be plundered. This enabled him to become familiar with the plan of Mr. Messersmith's house and banking-room. The evidence was abundant to justify the conclusion that the object of all this social intercourse was to throw the cashier off his guard. To further inspire confidence, Rolland gave him one or more sealed packages, represented to contain valuables, but which were of course but waste paper. It was a cunningly-devised scheme — planned with skill, and executed with boldness. It would have succeeded in all probability but for Mr. Messersmith's manly and stubborn resistance. This was probably unlooked for in view of the disposition of the modern cashier to hand over the keys upon demand. The defendant and his confederate having thus laid and matured their plans, the next step was to effect an entrance into the bank. Mr. Kindline states how this was done:

"I reside in the bank with Mr. Messersmith; I was in bank on night of 24th of March last; I answered the call of the bell; between eight and nine o'clock that night a bell rang from the outside; I was in the main hall when the bell rang; it was then nighttime; the door was fastened with the dead-latch; it could not have been opened from the outside; I sprung back the dead-latch; I found two men there; one I recognized as Rolland; he asked me whether Mr. Messersmith was in; I said no, he had just walked out; he said he was sorry, that he had a friend from New York that wanted to transact some business with him, and he introduced a Mr. Johnston; defendant is the man; he said he would call later in the evening; I said it was a disagreeable evening, and Rolland said yes, we may have some sleighing yet; then they left. Shortly after Mr. Messersmith came; we talked in the parlor; I did not tell Mr. Messersmith that these parties had been there to see him; I went up-stairs, and Mr. Messersmith to his office; some time after, fifteen or twenty minutes, I heard the bell ring again; I answered it a second time; the dead-latch was down; the door was locked; it was at front door, leading from the street into the hall of the

house; I opened the door and found there Rolland and the man he had before introduced as Johnston; he asked me if Mr. Messersmith was in, and I said he was; they came in and put their hats on the rack; Johnston had an overcoat; took that off and hung it up; they had an umbrella this time; I led the way through the hall into the dining-room; they followed to Messersmith's office; I opened the door of the cashier's room, leading from the dining-room in, and saw Messersmith at the grate with his back toward the door."

Was there evidence here of a constructive breaking? Of an entrance obtained by artifice and fraud, by means whereof Mr. Messersmith was deceived and the law evaded? The court below said in answer to the defendant's fourth point: "If you believe that long before the 24th of March, 1876, Rolland had conceived the idea of entering the bank of Chambersburg with intent to rob or steal, and concocted a plan by which he might effect such purpose; that he cultivated the acquaintance of the cashier and placed himself on as familiar terms as he could with him and his family, and began to talk to him of the buying of farms, and finally stated that he had a friend whom he wished to have come to Chambersburg to reside, and spoke of the Stouffer farm and thought it was too small; and on the night in question presented himself with a friend, who he stated had some business with the cashier, and if you believe this was false and fraudulent and intended to obtain admission to the house, and that it was by means of this that Rolland and Johnston did in fact obtain admission into the house, then this was such a fraud as amounted to a constructive breaking. If Rolland, by frauds and tricks and artifices, deceived the cashier, and induced him to believe that he was concerned to buy a farm for a friend, and that if he would call at his house with such a friend it would be for that purpose, and that it was thus that he was received into the house, and the whole household was so deceived, and Kindline opened the door under the influence of Rolland's deceptions as to his true character and purposes, it was a constructive breaking." This ruling was not only free from error, but it was more favorable to the defendant than he was entitled to. It was laying an unnecessary burden upon the Commonwealth. If, when Rolland and Johnston rang Mr. Messersmith's bell, they did so with the intent of entering under the guise of friendship or the pretense of business, and then robbing the bank, it was a burglarious entry; it

was a breaking within the meaning of the law. Nor would it matter that one of the burglars had established such social relations with Mr. Messersmith that he would have been admitted without question. It makes the fraud the greater. The dead-latch was down and the door was locked. The bolts were withdrawn upon the implied if not express assurance that they came there as friends for social intercourse or to transact business. This assurance in either case was a trick and deception. The law is not so impotent as to permit a burglar to enter a house under such circumstances and yet evade the responsibility of his act. We are not asserting any new doctrine nor extending the application of an old one. The principle is fully sustained by the authorities cited in *Rolland v. The Commonwealth*, 1 Norris, 306; 22 Am. Rep. 758. In addition I will refer to Sharswood's Blackstone, vol. 2, p. 226; Wharton's Crim. Law, vol. 2, § 1539; Roscoe's Crim. Ev. 346; Bacon's Abr., title Burglary (A.), 133; Chitty's Crim. Law, vol. 3, p. 856, where numerous authorities are cited in support of the text. In *Ducher v. The State*, 18 Ohio, 317, the facts were these: Sarah Brown was living in the house with her son, John Ondery. On the night mentioned in the indictment they were awakened by some one knocking at the door; in answer to which John said, "Come in." The persons outside pulled the latch-string without being able to open the door, when they stated that they could not come in. John then got up and opened the door, when two men walked into the house. After they had entered one of them nearly closed the door and stood by it; the other stated that they had a warrant for John Ondery from the prosecuting attorney of Pick-away county. John asked for time to put on his clothes, and after he had done so, one of the men told him they wanted his money, and asked for his mother's money. John said it was in a chest. They told her to get the key which she did. They tried to open the chest, where John told them the money was, and being unable to do so, with threats of violence induced her to do it, and then took from the chest the money described in the indictment; *held*, that this was a constructive breaking under the Ohio statute, which provides against a *forcible* breaking and entering. It will be observed, in the case above cited, that the door was opened in obedience to a knock. Not a word was said by way of inducement to open it; yet it was a manifest trick and fraud. When a person rings a door-bell of a house, the owner has a right to presume that

his visitor calls for the purpose of friendship or business. If, in obedience to the summons, he withdraws his bolts and bars, and the visitor enters to commit a felony, such entry is a deception and fraud upon the owner and constitutes a constructive breaking.

[Omitting minor matters.]

So much of the judgment of the Oyer and Terminer as imposed an imprisonment of six years and four months under the second count of the indictment is affirmed, and so much of the judgment as imposes imprisonment of three years and ten months under the third count of said indictment is reversed.

Judgment reversed.

ROLLAND V. COMMONWEALTH.

(85 Penn. St. 66.)

Criminal law—burglary—opening inner door.

Opening the inner door of a dwelling-house, at night, with felonious intent, constitutes burglary, whether the felony is to be committed in the particular room or in another.

INDICTMENT for burglary. The opinion sufficiently states the point. The prisoner was convicted.

O. C. Bowers, district attorney, and *John Stewart*, for the Commonwealth.

Duncan & McGowan and *J. McDowell Sharpe*, for plaintiff in error. To constitute burglary by opening an inner door, the intent must be to commit a felony in the very room into which entrance was thus effected. *Edmond's case*, Hutton, 20; 1 Hawk. P. C. 102; *Rex v. Gray*, 1 Strange, 481, 2 East's P. C. 488; *Stute v. Wilson*, 1 Coxe (N. J. L.), 441; *U. S. v. Brown*, 4 Cranch, 604; *State v. Henry*, 9 Ired. 471.

PAXSON, J. This record presents but a single question. Was there such a breaking as constitutes felonious burglary? That the opening of an inner door may be such breaking is too well settled to need discussion. If a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is

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no burglary; yet if he afterward unlocks an inner door or chamber door, it is so: Sharswood's Blackstone, vol. 2, p. 226. The same rule is asserted in Wharton's Criminal Law, vol. 2, § 1536; 1 Bishop's Cr. Law, 308; Roscoe, p. 302, and numerous authorities cited in which the point has been decided. It was conceded at bar that the law is so, but it was contended that in the case of the opening of an inner door, it must be accompanied with an intent to commit a felony in the very room so entered. We do not assent to this qualification of the common-law rule. If a burglar, entering by an outer door or window, incautiously left open, with the intent to commit a felony in a particular room in the house, as if he intends to rob a safe with the location of which he is familiar, and in furtherance of his design, and to enable him to accomplish it successfully, opens the door of the adjoining room in the same house to gag and bind the owner sleeping therein, it is a breaking within the meaning of the law defining the offense of burglary. Yet in such case there would be an entire absence of an intent to commit a felony in the bed-room. The binding of the owner, standing alone, would be a mere assault and battery, punishable as a misdemeanor. Taken in connection with the main object it assumes a different character, and becomes a necessary incident of the felony as much so as the lifting of a latch or the breaking of the door of the safe. The true test, as applied to an inner door of a house, is whether it was opened in the perpetration of or attempt to perpetrate the felony. If it was a necessary act in the perpetration of the felonious design, it can make no difference that the felony was to be committed in an adjoining room. There may be cases in which the qualification referred to would apply, as in the case of a lodger at an inn who intends to commit a felony in another room in the same house. But if such qualification exists in any case, we fail to see its application to the facts of the case at bar. We will not strain the law to meet a particular case, nor will we refine it away in the interest of burglars. We think the court below submitted the question of intention fairly to the jury. They were told that if the prisoner opened the door for the purpose of escaping, he could not be convicted of burglary; but if it was done in furtherance of a design to commit a felony in the house, the offense was complete. This ruling was clearly correct.

[Omitting a statutory consideration,] the judgment is affirmed.

Judgment affirmed.

FIRST NATIONAL BANK OF CARLISLE V. GRAHAM.

(85 Penn. St. 91.)

National bank — liability as bailee for special deposit.

In accordance with its habit, well known to the directors, a national bank received from a customer some bonds for safe-keeping, and the cashier gave a receipt for them. The bonds subsequently disappeared, but in what manner was not shown, and the president and cashier assured the depositor that she should lose nothing, and the interest was paid her for two years. *Held*, that there was sufficient evidence of gross negligence on the part of the bank to go to the jury, and that the bank was liable for such gross negligence of its officers.*

ASSUMPSIT to recover bonds deposited by plaintiff with defendant upon the receipt of the cashier, "for safe-keeping," and "to be returned on return of this receipt."

The plaintiff had judgment. The opinion states the other facts.

W. F. Sadler and S. Hepburn, Jr., for plaintiff in error. The bank had no authority to take deposits for safe-keeping. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278; *Wiley v. Nat. Bank of Brattleboro*, 47 Vt. 546; *Fowler v. Scully*, 22 P. F. Smith, 456; *Bank of Pennsylvania v. Commonwealth*, 7 Harr. 155; *Bank of United States v. Dandridge*, 12 Wheat. 64; *Head v. Providence Ins. Co.*, 2 Cranch, 167; *Venango Nat. Bank v. Taylor*, 6 P. F. Smith, 14.

John Hays and J. H. Graham & Son, for defendant in error.

PER CURIAM. Looking at the almost universal practice of banks of all kinds to accept special deposits of valuable securities from their customers, and the evidence in this case that such was the habit of this bank with the privity and knowledge of the directors and officers, we are of opinion that a liability for safe-keeping is

* See *First Nat. Bank of Lyons v. Ocean Nat. Bank* (60 N. Y. 278), 19 Am. Rep. 181, and note, 192; *Wiley v. First Nat. Bank* (47 Vt. 546), 19 Am. Rep. 122; *First Nat. Bank v. Graham* (79 Penn. St. 106), 21 Am. Rep. 49; *Scott v. Nat. Bank of Chester Valley* (73 Penn. St. 471), 13 Am. Rep. 711. In *Whitney v. First Nat. Bank*, 50 Vt. 388, it was held that a national bank was not liable for a deposit for gratuitous safe-keeping, though made according to usage and with the knowledge and acquiescence of the directors.

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raised by the receipt given to the plaintiff in this case for her bonds. If the bonds be lost or stolen through the gross negligence of the bank this liability becomes fixed. The debatable question in this case is whether there was sufficient evidence of such negligence to be submitted to the jury. Upon the whole evidence we think there was. Whether the bonds in question were lost, stolen or abstracted by some one in the bank does not clearly appear. It certainly is a circumstance of some weight that a satisfactory solution of the manner of the loss has never been given by the bank. If, then, we refer to the structure and arrangement of the banking house and the vault, we find it almost impossible that this vault could have been entered in broad daylight, as alleged it must have been, by a person entering to steal these bonds, without his being seen by the officers of the bank. If we add to this an entire absence of any breach of the windows, doors, vault and floors, through which an entry might have been effected, and that no information was given to the plaintiff of the loss of her bonds until she called herself, and then she was called into a private room to communicate the loss, the case acquires more strength. And then, if finally she was told by the bank that the loss would not be hers but that of the bank, and that the bank would continue to pay her the interest, and accordingly did so for about two years, carrying the payments into the books of the bank, implying a consciousness of the officers that the loss was caused by some fault of the bank, we reach a point in the evidence of such strong import as to the fact of gross negligence, the evidence could not be withheld from the jury. Having been submitted to them, and gross negligence found by them, and a new trial refused, we cannot say that the evidence was insufficient, and that an error was committed. The verdict establishes the negligence. We discover no error in the record and the judgment is affirmed.

Judgment affirmed.

ARNOTT'S ADMINISTRATOR V. SYMONDS.

(85 Penn. St. 99.)

Negotiable paper — irregular indorsement — liability upon.

A negotiable promissory note was indorsed by the payees in the usual position. The defendant had previously written his name across the back of the note near the other end, in an inverted position. *Held*, that the defendant was liable as second indorser.*

ASSUMPSIT. The opinion states the facts. Defendant had judgment.

M. F. Elliott, for plaintiff in error.

Henry Sherwood and *C. H. Seymour*, for defendant in error.

STREBETT, J. Suit was brought by the plaintiff in error against the defendant as indorser of a note, made by Houghton, Orr & Co. to the order of Booth, Dounce, Rose & Co., and by them indorsed. The name of the payees appears on the back of the note in the usual position of the first indorser, about three inches from the left end, and that of the defendant is written in the opposite direction, about the same distance from the right end of the note; so that the latter indorsement with reference to the former may be said to be inverted. This inartistic peculiarity, in the relative position of the names, has given rise to the question of defendant's liability as second indorser. This depends on whether the payees, from their position on the note, are to be regarded as first indorsers. If the defendant, in case he is required to pay, will have recourse to the payees, it follows that he is liable, as second indorser, to the holder. Whether he would have such recourse or not is really the test of his liability.

It appears from the testimony that in pursuance of an understanding between the makers and the payees, to the effect that the former was to furnish security, in addition to the firm name, the defendant by request indorsed the note before it was delivered to and indorsed by the payees. This, however, is immaterial, so far

* See *Burton v. Hansford*, *ante*, p. 571, and note, p. 580.

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at least as the plaintiff is concerned. Both names were on the note, just as they now appear, when it was presented to his bank for discount. He had no knowledge of the transaction except what might be derived from the face of the paper and the position of the indorsements thereon. The only ground of defense was that the defendant's indorsement, as shown by the note itself, was irregular or anomalous, and, therefore, on the authority of *Schafer v. Farmers and Mechanics' Bank*, 9 P. F. Smith, 145, and kindred cases, he was not liable. The learned judge entertained this view of the case and accordingly directed a verdict for the defendant. In this we think there was error. It cannot be doubted that a person who puts his name on the back of negotiable paper, before the payee has indorsed it, means to pledge in some shape, his responsibility for the payment of it; and it has been settled by this court, that, in the absence of legal evidence of any different contract, he assumes the position of second indorser, and that to render his engagement binding, as to any holder of the note, the implied condition that the payee shall indorse before him must be complied with, so as to give him recourse against such payee. *Schafer v. Bank, supra*; *Eilbert v. Finkbeiner*, 18 P. F. Smith, 247; 8 Am. Rep. 176. As was said in *Herrick v. Carman*, 12 Johns. 160, the fact of his indorsing first, in point of time, can have no influence, for he must have known, and we are bound to presume that he had acted on the knowledge that though the first to indorse, his indorsement would be nugatory unless preceded by that of the payee. Before the act of 1853 went into effect it was competent to prove by parol that the irregular indorser agreed to become surety for the maker or undertook to guaranty the payment of the note, etc.; but the statute effectually closes the door against this species of proof, and requires such agreement or understanding to be evidenced by some memorandum or note thereof in writing, signed by the party. Hence, in the absence of legal evidence to the contrary, the position of one who indorses in point of time before the payee is that of second indorser, and he cannot be held unless the payee assumes the place of first indorser. Taking the note then just as it was when presented for discount, what was the legal relation of the indorsers? The payees had placed their firm name on the note in the position usually occupied by the first indorser, and there is nothing to justify the inference that they intended to avoid the responsibility which usually attaches to a party occupying that posi-

tion. If they had written their name in the same direction and immediately under the indorsement of the defendant, the inference would have been quite plain that they did not intend that he should have recourse to them. The legal effect of placing their name where it is, without any indorsement above it, is to make them liable as first indorsers.

When the payee negotiates a note made to his own order, he naturally and ordinarily becomes first indorser, and in the absence of competent evidence to the contrary, the holders or indorsees will have recourse to him, if the paper is dishonored. There is nothing on the face of the note or in the position of the indorsements in this case, to make it an exception to the rule. The fact that the defendant's name, considered in relation to the payee's indorsement, is inverted, can make no difference. Instead of having been written in the opposite direction and parallel to that of the payee's, it might have been placed diagonally thereto, or in any other position so that it was not over or above it. There is no evidence that the plaintiff knew which indorsement was made first in point of time; nor would it be material if there was. The only knowledge he had was such as the paper itself imparted, and from this he had no notice that could in any way affect his right to recover against either of the indorsers.

It may be that this view of their legal relation, as derived from the position of the indorsements, will defeat the object the payees had in requiring the makers to furnish an indorser. If so, it must be accepted as the result of their mistake in taking the note, made to their own order, instead of to the order of the defendant. The same result would flow from the ruling of the court below. If suit were brought against them by the defendant, they could not successfully say that they do not appear on the note as first indorsers, nor would they be permitted to prove by parol that their liability was secondary to that of the defendant.

Judgment reversed and a *venire facias de novo* awarded.

Judgment reversed.

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KELLY v. CITY OF PITTSBURGH.

(86 Penn. St. 170.)

Taxation — farming lands added to city — lack of benefit.

The limits of a city were extended by legislative enactment so as to embrace farming lands. The lands were taxed for municipal purposes, some of which afforded no benefit or protection to them. *Held*, a constitutional tax. (See note, p. 688.)

BILL to restrain a tax. The opinion states the case.

A. N. and W. H. Sutton, for appellant. The city taxes these lands for fire, water, schools and city buildings, and yet none of these are necessary or available. The legislature cannot confer upon a municipality the power to tax property that receives no benefit or protection therefrom, and for purposes in which the people taxed have no interest. *Sharpless v. Mayor of Philadelphia*, 9 Harris, 147; *Hammett v. City of Philadelphia*, 15 P. F. Smith, 153; s. c., 3 Am. Rep. 615; *Washington Avenue*, 19 P. F. Smith, 352; s. c., 8 Am. Rep. 255; *McKeen v. County of Northampton*, 13 Wright, 524; *Pittsburgh, Fort Wayne and Chicago Railway Co. v. Commonwealth*, 16 P. F. Smith, 73; s. c., 5 Am. Rep. 344; *Lewis v. County of Chester*, 10 P. F. Smith, 329; *Borough of Carlisle v. Marshall*, 12 Casey, 402; *Hilbish v. Catherman*, 14 P. F. Smith, 159; *Durack's Appeal*, 12 id. 491; *Grim v. Weissenberg School District*, 7 id. 437; *State v. Mayor of Newark*, 18 Am. Rep. 729; 8 Vroom, 415; *Weismer v. Village of Douglas*, 64 N. Y. 91; s. c., 21 Am. Rep. 586; *Bradshaw v. City of Omaha*, 1 Neb. 16; *State of Georgia v. Stanton*, 6 Wall. 50. The mere extension of corporate territorial boundaries does not carry with it *per se* the right and power to tax for all municipal purposes: *Seely v. City of Pittsburgh*, 1 Norris, 360; s. c., 22 Am. Rep. 760; *Hammett v. Philadelphia*, 15 P. F. Smith, 146; s. c., 3 Am. Rep. 615; *Washington Avenue*, 19 P. F. Smith, 352; s. c., 8 Am. Rep. 255; Cooley on Taxation, 104 *et seq.*; *Cheaney v. Hooser*, *supra*; *City of Covington v. Southgate*, *supra*; *Morford v. Unger*, *supra*.

Thomas S. Bigelow, city solicitor, and George Shiras, Jr., for the city.

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GORDON, J. The lands of James Kelly, the appellant, upon which the taxes complained of were assessed, were formerly within the township of Collins, and were afterward, under the provisions of the act of April 6, 1867 (Pamph. L. 846), made part of the city of Pittsburgh. That there may be no doubt concerning the subject-matter of the plaintiff's complaint, and that we may exhibit precisely the nature and character of his contention, we give the 6th paragraph of his bill *in extenso*.

"It is competent for the legislature, with or without the consent of the citizens, to enlarge the limits of any town or city, and it is competent for the defendant (city), when the requirements of population, commercial and mechanical interests, sanitary or protective municipal purposes require it, to apply to city uses, the full extent of her territorial limits, but your orator expressly denies that such necessity or even propriety exists; on the contrary, large amounts of city territory, on either side and in front of your orator's farm, are occupied, held and owned, without prospects of demand for city purposes for many years to come. Your orator insists that by extension of city territorial limits, the character, situation and use of his said lands were not changed, but remain an improved and occupied farm as before, and agricultural lands only, having received no benefit whatever in the way of municipal improvements, aid, protection, convenience or care; and that, therefore, they are not in any sense liable to municipal or city taxation for any purpose whatever, for no single benefit has been received." Again, paragraph 18, latter part: "But your orator expressly denies that the defendant had any municipal jurisdiction over his said land, or farm, or any right to impose taxes thereon, for city or municipal purposes whatever."

We are thus presented with the broad question of the right of the city to tax rural lands within its bounds for any municipal purpose whatever. It is not admitted that the city succeeded to the rights of the township in this respect, for this would be a surrender of the whole controversy, since it is not doubtful that the township had the power to tax these lands for every lawful municipal purpose whatever.

The power of the legislature to transfer the plaintiff's farm from the one municipality to the other is admitted; indeed that power could not, in the face of *Smith v. McCarthy*, 6 P. F. Smith, 359, be gainsaid. But it is urged, nevertheless, that the city's power of

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taxation must be suspended until this land becomes necessary for city uses. Exactly what this means we are not informed, nor do we suppose it can be certainly known except from some judicial decree not yet rendered. No doubt the meaning of the plaintiff is, that this power of the city is to be suspended or to rest in abeyance until the city is so nearly built up to his lands that they may be advantageously laid out and sold as city lots, and until this occurs they are to be exempt from all taxes of municipal character. This proposition is novel in Pennsylvania, since we have uniformly, and heretofore without serious complaint, in boroughs as well as cities, taxed rural and even unseated lands for borough and city purposes. This doctrine is, however, supported by certain cases, cited by the learned counsel for the appellant, decided in the superior courts of Iowa and Kentucky. The bill seems closely to have followed these cases, and it is principally upon their authority that the plaintiff's case is rested. These decisions, whilst entitled to great respect, are not to be allowed to unsettle our own rules on the subject of taxation or change the current of our policy on that subject. They are, indeed, of doubtful authority; for Judge COOLEY, in his work on Taxation, when speaking of these very cases, remarks: That it is difficult to harmonize them with the conceded principles governing the laws of taxation; for they, not questioning the legislation as being in excess of authority, leave it to stand, and only interfere to qualify its effect on the ground that it has been adopted on improper grounds and will operate unequally. This is done on an inquiry into the facts and a substitution of the judicial for the legislative conclusion on a subject not at all judicial; a subject too — the proper limits of city extension — upon which persons are certain to differ widely, and where inquiry, after the judicial method by examination of witnesses, is usually much less satisfactory than that personal knowledge and investigation which legislators are supposed to possess or make. It has, indeed, the effect to suspend the legislation until certain conditions influencing the judicial mind are fulfilled. We need not stop to consider the inconvenience or uncertainty of such a condition of things, or how little consonant it would be with our settled modes of thought and action on subjects of this kind. There is, however, an element in the case in hand, which either did not exist in the cases alluded to or was not sufficiently considered; that is, the subjugation of the lands to previous municipal taxes. The argument in favor of their

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exemption would have more strength had they, previously to their attachment to the city, been subject only to State and county rates and levies; had they not been within the dominion of any municipality equivalent to that now complained of. But the plaintiff's property was subject to municipal taxes when it was yet in the township of Collins, hence, it is not subjected to any new or even greater powers than formerly; it has been but transferred from township to city. This element breaks the force of the plaintiff's argument, as it leaves him nothing of which to complain; for his complaint is not that his municipal burdens are greater in the city than they were in the township, but that as his lands are now situated the city has no power to tax them in any manner whatever. This is the bald proposition submitted for our discussion; a proposition requiring little consideration for its disposition, since there is here no room for the intervention of judicial interference, or for the exercise of judicial discretion. The legislature certainly did not exceed its powers in the act consolidating the two municipalities, and as both had the power of taxation over their several territories, that power must remain with the present corporation, and the plaintiff's lands must continue liable for those rates and levies to which it was subject under the township government, otherwise they are exempt from those impositions for the maintenance of the public schools, the support of the poor and construction and repair of the highways, from which no one's property ought to be exempt.

On the broad ground, therefore, on which the plaintiff has put his claim, it cannot be maintained and must be dismissed. Considering it, however, from the less general, and most favorable point of view and it but comes to this: That the taxation is unequal and burdensome, and that the complainant is taxed for some things, as police and water from which, however necessary for the welfare of the municipality, he derives no benefit. Granted, that the tax is both unjust and unequal, it does not follow that the remedy is within the power of the courts; on the other hand, the contrary has been expressly ruled. In the case of *Weber v. Reinhard*, 23 P. F. Smith, 370; 13 Am. Rep. 747, Mr. Justice SHARSWOOD says, in commenting on the case of *The Philadelphia Association v. Wood*, 3 Wright, 73, "the idea that the court could pronounce a tax unconstitutional on the mere ground of injustice or inequality, was expressly repudiated." He further remarks: "There is no provision in the Constitution that taxation shall be equal. Sound

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policy requires that it should be, so far as possible, but perfect equality is not possible."

So in *Kirby v. Shaw*, 7 Harris, 258, GIBSON, C. J., says, "As regards taxation, there is no limitation of it. Equality of contribution is not enjoined in the bill of rights, and probably, because it was known to be impracticable." That the person taxed derives no immediate personal benefit from the purposes to which the taxes are appropriated, is, in like manner, no argument against the constitutionality of the law imposing them. For if direct personal benefit were to form a criterion for taxation we should have half the community clamoring at our doors for relief. What interest, direct and personal, has the unseated land-owner in the schools or poor of the borough or township in which his lands lie? Or, for that matter, what interest has any one, not having children to educate, in the schools of either township, borough or city? Why shall one pay road tax when roads are of no benefit to himself or his property? Why shall he help pay the expenses of a fire department when his property is so situated that it may burn down before an engine can reach it? Or, why, either in the country or city, having a supply of water on his own premises, shall he pay a water tax? To these questions there is but one answer; these things are intended for the public good, and hence, every one is indirectly, if not directly, benefited thereby; the taxes levied for their maintenance are a public burden, and, therefore, every one must contribute to its support. If, however, this burden rests unfairly heavy upon some classes or upon some individuals, the remedy is not with the courts but with the legislature. As is said in *Kirby v. Shaw*, the judiciary could interfere only "by overstepping the limits of its sphere; by arrogating to itself a power beyond its province; by producing intestine discord, and by setting an example which other organs of the government might not be slow to follow." But the legislature has granted all the relief that the plaintiff and his class ought, in reason, to expect or ask, for at the time of filing of this bill, rural lands were authorized to be taxed at but two-thirds of the ordinary municipal rates, and now, by the act of May 5, 1875, Pamph. L. 124, at but one-half those rates. Thus the injustice and inequality of the taxation complained of has been, if not wholly obviated, at least very much mitigated.

Again, taxation is peculiarly a legislative function, and, before we undertake to revise it, we should have a clear warrant therefor

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in the letter of the Constitution. "A tax law must be considered valid, unless it be for a purpose in which the community taxed has no palpable interest—when it is apparent that the burden is imposed for the benefit of others, and when it would be so pronounced at first blush." *Sharpless v. The Mayor of Philadelphia*, 9 Harris, 147 (BLACK, C. J.); *Speer v. Blairsville*, 14 Wright, 150 (AGNEW, J.). But in the present case there is no doubt that the community, called the city of Pittsburgh, of which the plaintiff is a member, has a direct and vital interest in the taxation complained of, and such being the case, there is an end of our power to grant relief.

It will not do for us to stop to consider the peculiar interests of the individual as segregated from the community, for if we should so do, few tax laws could be enforced, since it often if not generally happens that such laws bear hardly upon some individuals, and not unfrequently individual interest is opposed to that of the public. We must have regard to the public welfare. If it be not shown to us that the legislation is for the promotion of the good of some other party or community than the one taxed, we have no right to pronounce it unconstitutional. The individual must be regarded as interested in the public welfare, hence his interest must be looked for in that of the community of which he forms part. Now, it may be true that the plaintiff is not personally benefited by either the educational or poor department of the city; but neither is any one not having children to educate, and not being himself a pauper. Yet, for such reason, we are hardly prepared to stay the hand of the collector of school and poor rates. He may not be personally benefited by the fire or police department; but the general municipality is largely benefited thereby, and his welfare is found in the prosperity of that municipality. As was well said by the learned master to whom this case was referred, the value of the plaintiff's property has heretofore depended upon the growth and prosperity of the city; but these, in turn, depend upon the character of the city streets and police department, and upon its water, gas and educational facilities. Without these it would fall into decay, and the value of real estate within the boundaries of the municipality, including that of the complainant, would be incalculably reduced. It is thus apparent that the plaintiff has not only a general, but a direct interest in the objects which the taxation complained of is intended to promote.

Decree affirmed.

AGNEW, C. J., and STERRETT, J., dissent.

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NOTE BY THE REPORTER. — In consideration of the importance of this question, we subjoin portions of the dissenting opinion of AGNEW, C. J.:

"If the legislature can, by a mere extension of boundary, authorize the city to tax farm lands for purely city purposes, it might, without extension, direct all farms within given lines, outside of the city, to pay these city taxes. Thus, when we get rid of that confusion of thought which confounds extension of boundary and power of taxation, we perceive that taxes laid on mere farm lands to pay city levies applicable only to the built-up or true city, is nothing more than an order to farmers to pay for the benefit of the city residents; it is taking the money of A to pay for improvements made for the use of B. This is palpably and flagrantly unjust, and, therefore, against common right. If the legislature itself cannot compel farmers to pay city taxes for purely local purposes in which they have no share, it is clear it cannot authorize the city to do indirectly what it cannot do directly. An order, with or without the extension of boundary, upon a certain class to pay taxes for local benefits conferred on others, is wholly different from a power to lay a general tax for the support of government. The latter is a power to which every citizen of a State submits himself in consideration of the general benefits derived from government. But as to the former, it is well said, in *Bradshaw v. The City of Omaha*, 1 Neb. 16, that the object is to make the owners of farms divide the expense of supporting the municipal government with those who need it; that the true city is the built-up part, while the levy of taxes on farms is to confiscate property outside for the benefit of those within the true city. See, also, *Taylor v. Porter*, 4 Hill, 140; *Holden v. James*, 11 Mass. 396.

"The power of the legislature is clear to divide the State, for convenient local government, into counties, townships, cities, boroughs, etc., conferring on each an appropriate autonomy. But in doing this, the powers conferred must be adapted to the ends to be accomplished by each. A sound and large discretion is necessarily exercised in this adaptation of powers. But it is equally clear that the powers conferred must have a reasonable appropriateness to the end proposed. Such an exercise of power only can fairly comport with the true and acknowledged principles of our American governments, which are all founded on the rights of the people, and for their 'peace, safety and happiness.' Section 2, Declaration of Rights, New Constitution. These principles are well stated by Justice CHASE in *Caldwell v. Bull*, 3 Dall. 386: 'The people of the United States,' he says, 'erected their Constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it.' Again: 'There are acts which the Federal or State legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of the legislative power; as, to authorize manifest injustice by positive law; or, to take away that security for personal liberty or private property for the protection whereof the government was established.'

"The same thoughts were thrown out by Chief Justice MARSHALL, in *Fletcher v. Peck*, 6 Cranch, 87: 'It may well be doubted,' he says, 'whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection.'

"This is precisely the question before us, whether, under the mere name or color of taxation, the legislature can confer on a city a power to transfer the money or property of farmers outside of the true city to those who live within it, for purposes by which they alone are benefited?

"The inviolability of the right of private property and the natural boundary of the legislative power has been enforced already in this State in the case of *Washington*

Avenue, 19 P. F. Smith, 363, in these words: 'When, therefore, the Constitution declares in the ninth article, that among the inherent and indefeasible rights of men is that of acquiring, possessing and protecting property, that the people shall be secure in their possessions from unreasonable searches and seizures; that no one can be deprived of property unless by the judgment of his peers or the law of the land; that no man's property shall be taken or applied to public use without just compensation being made; that every man for an injury to his lands or goods shall have remedy by due course of law, and right and justice administered without sale, denial or delay, and that no law impairing contracts shall be made, and when the people to guard against transgressions of the high powers delegated by them have declared that all these rights are excepted out of the general powers of government, and shall forever remain inviolate, they for their own safety stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause, nor the united fagot broken stick by stick, until all its strength is gone. There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions that covers it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions, under any name or pretext; nor is this sanctity incompatible with the taxing power, or that of eminent domain, where, for the good of the whole people, burdens may be imposed or property taken. I admit that the power to tax is unbounded by any express limit in the Constitution; that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must, therefore, visit all alike in a reasonably practicable way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people by districts and by turns, but still it must be public in its purpose and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction; to do so is confiscation, not taxation; extortion, not assessment; and falls within the clearly implied restrictions of the bill of rights.'

"Therefore, while we concede the wide range to be given to legislative discretion in adapting the means to the end, that is, to the purposes of local government, there is a limit beyond which the legislative power cannot sacrifice the sacred right of private property. This limit is reached when it palpably and plainly sacrifices this right, which the people themselves have jealously guarded against transgression in their fundamental law. There must be, therefore, a reasonable appropriateness in the means employed to execute the legislative purpose. This has been well expressed by Chief Justice MARSHALL, that bright luminary of constitutional law, in discussing the power of Congress, under the 19th clause of the 8th section of the 1st article of the Federal Constitution, to make all laws necessary and proper for carrying into execution the Federal powers. 'But we think,' he said, 'the sound construction of the Constitution must allow to the national legislature that discretion with regard to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which plainly are adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' *McCulloch v. Maryland*, 4 Wheat. 316. The italics are mine.

"This was said by that great jurist of an express power to pass all laws necessary and proper to execute expressly conferred powers—the means must be appropriate—must be plainly adapted to a legitimate end—one not prohibited, but consistent with the letter and spirit of the Constitution. How much stronger, then, does the language apply to a case like this, where no express power over the means is given, but the power is left to be inferred only from its appropriateness.

"The taxing power conferred on the city, therefore, cannot extend to such a case as this, where a ruinous burden is laid on land wholly rural and outside of the city proper, for purely local and city objects, in which Mr. Kelly, the owner, has no interest. This dis-

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inction between local taxation for purely local purposes, and general taxation by the State, in which all are interested, cannot be overlooked or thrust aside. It is the very pivot of the question. *People v. Mayor of Brooklyn*, 4 Comst. 419; *Morse v. Stocker*, 1 Allen, 159. It is not the extension of boundary which is unconstitutional, but it is the imposition of a burden, where it is palpably and flagrantly unjust and contrary to common right. *Bradshaw v. Omaha*, 1 Neb. 16.

"We are not without very respectable and numerous precedents for the doctrines contended for. The very point in question is decided in the following cases: *Cheaney v. Hooser*, 9 B. Monr. 330; *Covington v. Southgate*, 15 id. 491; *Morford v. Unger*, 8 Iowa, 82; *Langworthy v. Dubuque*, 13 id. 86; *Fulton v. Davenport*, 17 id. 404; *Bradshaw v. Omaha*, 1 Neb. 16. The opinions in some of these cases are elaborate, well considered and very convincing to my mind.

"Much of the answer given to this view of the natural right of property secured by constitutional limitations is a mere criticism on words. Thus it is said the protection claimed refers only to the power of *eminent domain*, which relates to a taking, not a taxation, of property. Even this clause is entitled to a liberal interpretation. *Pearce's Heirs v. Patton*, 7 B. Monr. 162. But the declaration of rights does not confine its protection to this clause when it declares the *inherent* right of private property, and places it on the same high plane of protection as the rights of *life and liberty*, or when it declares that the *possessions* of the people, as well as their persons, houses and papers, shall be secure from *unreasonable seizures*; and when it asserts that free governments are instituted for their peace, safety and happiness. Indeed, the whole circle of fundamental rights rise up in earnest protest against the doctrine of the absolute despotism of the legislative power over property; while the clause relating to the power of eminent domain only strengthens the protest. It is not the province of the courts, which stand between the citizen and the abuse of power by public servants, to fritter away these clauses to mean next to nothing. Eminent domain is simply high and eminent domain, and is but another name for sovereignty. Specially, it is but one of the powers of sovereignty, which includes the taxing power as well as that which takes. Taxation exacts of the owner of property a share of the public burdens, as his just proportion, for the benefits received from the government. Eminent domain goes a step farther, and takes more than a just share, and, therefore, awards compensation for the excess. *People v. Brooklyn*, 4 Comst. 420. But it is evident that both are founded on the consideration of benefits conferred in some form. Sovereignty, in a constitutional government under a bill of rights, imports no arbitrary power for any purpose. What is taxation but a delegated power, and, therefore, subject to the fundamental rights of men, which government is intended to protect when the exercise of this power conflicts with them without just cause? If the power to tax be absolute and unbounded by just cause, there is no protection whatever. You cannot take property without just compensation, but you may tax it to destruction. You may not lop off a limb or cut off the head without a just cause, but you may bleed the whole trunk to death. Or if you cannot find a good cause, you may presume it; or you may find it in some infinitesimal quantity to furnish a pretext. Clearly, the power of taxation is not so destructive. It is bounded by the exigency which calls forth its exercise. *Kirby v. Shaw*, 7 Harris, 259, a case admittedly on the verge of the taxing power, contains probably the strongest expressions of the absolute character of the taxing power; yet these must be taken in reference to the case itself which called them forth, and it was one where a *special benefit* was conferred on the borough of Towanda, and the chief justice made this the corner stone of his argument.

"In discussing this question, the advocates of unlimited power ignore the distinction so palpable between the general power of taxation for the benefit of the whole State, though laid in districts, and the imposition of local burdens in return for *specific benefits*. As to the former, all men participate more or less in the general advantages of government; but there can be no such postulate for the latter where it is palpably clear the local burden is imposed without just cause and is plainly for the benefit of others. And a court must regard a substantial return not a merely speculative or shadowy benefit, which amounts to no more than a pretext.

"When, therefore, the exercise of the power of local taxation is manifestly arbitrary and palpably unjust and without just cause, when, according to Chief Justice MARSHALL, it is

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not 'appropriate' to the true purpose of local or city government, it is not constitutional, it infringes the fundamental rights of the citizen and is void. This is the rule laid down in *Sharpless v. City of Philadelphia*, 9 Harris, 164, and many other cases to determine the constitutionality of laws: *Fletcher v. Peck*, 6 Cranch, 87; *Cooper v. Telfair*, 4 Dall. 14; *Eakin v. Raub*, 18 S. & R. 339; *Commonwealth v. Smith*, 4 Blinn. 123; *Cheesey v. Hooser*, 9 B. Monr. 380; *Morford v. Unger*, 8 Iowa, 82; *Bradshaw v. Omaha*, 1 Neb. 16. In this case it is palpably, clearly plain, that as to gas, water, fire and police, Kelly's farm is taxed for purely city purposes in which it has no share. It is perfectly manifest that his money is transferred to a local use for the benefit of others. Why, then, shall a court hesitate to pronounce the burthen contrary to right, and void?"

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(85 Penn. St. 247.)

Municipal corporation — negligence — contractor.

A city employed a contractor to construct a sewer in one of its streets. By the contract, power was reserved to the city engineer to direct changes in the time and manner of conducting the work, and the contractor was held responsible to indemnify the city for any damages it should be subjected to in consequence of his neglect; and the contractor executed a bond to the city for such indemnity. The plaintiff was injured by falling into the excavation, carelessly left unguarded. *Held*, that the city was not liable to the plaintiff therefor. (*See note, p. 647.*)

ACTION for personal injuries. The contract mentioned in the opinion contained the following specifications: "The contractor will be required to guard the public effectually from liability to fall into the trenches or from upsetting their vehicles against the earth thrown from them, during the whole progress of the work, both by night and by day; and will be held responsible for any damages the city may have to pay in consequence of neglecting the necessary precautions.

"The contractor will be required to dismiss from his employment all incompetent or unfaithful persons; also, to keep in perfect repair, for six months after its completion, the whole of his work, except in cases where the repairs may be rendered necessary by causes clearly beyond his control.

"All the work to be commenced and carried on at such times and in such places and in such a manner as the engineer shall direct, he being aided by his assistants and inspectors. No work will be paid for unless accepted by the engineer or some other person

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appointed by the said street committee for the purpose. 'The contractor will not be allowed to open up more than one hundred feet of said State street at a time without the consent of the city engineer, and he is to keep clean the street after him so as not to interfere with travel any more than can be helped.'

The contractor was also required to and gave a bond to indemnify the city from any loss arising from failure on his part to perform his duty. The plaintiff had judgment.

Theodore A. Lamb and Davenport & Griffith, for plaintiff in error.

Allen & Rosenweig and J. Ross Thompson, for defendant in error.

GORDON, J. The accident which is the foundation of the present case resulted from the negligence of certain workmen who were engaged in the erection or construction of a sewer for the city of Erie. The excavation for this sewer, which was in one of the public streets, having been carelessly left unguarded, the plaintiff, on the night of the 26th of November, 1872, without any fault of her own, fell into it, and received the injuries complained of. The question now before us is, who is the responsible party? The defendant asked the court to say to the jury that, as the city had contracted with Peter Grant to construct this sewer, it was not responsible to the plaintiff for any injury she might have sustained in consequence of the negligence of Grant, or his agents or servants. The court refused so to charge, and this on the ground that, by the contract, the city reserved the power to use the street during the progress of the work, and to control the manner in which the work should be carried on; that it retained a power over the men employed by the contractor, and that, by the contract, it had provided for indemnity for any damages that might be recovered from it, arising from the neglect or carelessness of the contractor in doing the work. The first part of this proposition is not found in the contract, except inferentially, from the stipulation therein contained for the protection of the public from the danger of falling into the trenches, and from the upsetting of vehicles on the earth thrown out of them. It is, however, a matter of course that, in all cases of this kind, use shall be had of such parts of the streets as are not occupied by the contractor; but it is

also of course, that the contractor shall have the control over such parts thereof as are necessary for the proper execution of his work. The complaint, however, is not as to such portions of the streets as were in public occupancy, but as to those which, it is conceded, were necessarily occupied by the contractor under his contract. It must not be forgotten that the complaint is not that the street was used in an unlawful or unauthorized manner, but only that there was neglect in not erecting such guards, or in not maintaining such lights at night, as were necessary to protect the public from injury. Whether, therefore, the city did, or did not, retain the use of the street unoccupied by the work, is of no kind of significance.

The latter part of the court's proposition is faulty in that the converse thereof was ruled in *Wray v. Evans*, 30 P. F. Smith, 102. In that case there was this provision in the contract: "That all losses, accidents and damages of whatever kind and from whatever cause, which shall at any time happen to the work, or any person or persons whomsoever, shall be wholly borne and made good by the party of the first part." This provision was certainly as specific as that in the contract under consideration, but, because the company in that case provided against consequences in which it could not be involved, nothing was thereby added to its liability. Just so here, because the city supposed it might be liable for the negligence of its contractor, and so provided for indemnity, that surely did not make it so liable, if it were otherwise exempt from the consequences flowing from his want of care. If, however, the broad statement that the city reserved the power, not only to control and direct the manner in which the work should be done, but also the power over the men employed by the contractor, be true, then, indeed, is the city responsible for the negligence of all who were engaged in the construction of the sewer. In such case Grant must be considered but as an agent, over whose acts and conduct, in the prosecution of the work, the city would have unlimited control, and it must, in that event, be answerable for his negligence. Is this then a correct version of the contract? This question can only be answered by that instrument itself. By the terms of this contract Peter Grant was to furnish all the material and do all the work necessary to build and complete an eighteen-inch sewer, in State street, from the center of Fifth street to within twenty feet of the north line of Ninth street, according to the plan and specifications then on file in the office of the city engineer, which were made

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part of the contract. The whole job was to be done in a workmanlike manner, and under the supervision and to the satisfaction of the city engineer. In case of alterations made by the engineer in the specifications he was to decide what change, if any, should be made in the pay of the contractor. An estimate was to be made, not oftener than once every two weeks, when payment was to be made, according to the price fixed per foot for the work, fifteen per cent being retained until the final estimate and approval of the whole job. So far, then, the whole charge of this work was put into the hands of Grant, and the city had no power over it except to see that it was well done, and, to this end, stipulation was made for supervision by the city engineer, just as was the case in *Wray v. Evans*, and *Reed v. Allegheny City*, 29 P. F. Smith, 300.

Do the specifications so modify and change the body of the contract as to alter the *status* of the parties, giving the city such general control over the work as to make it the *superior* who shall be answerable for Grant and his employees? Let us see. By those specifications the contractor was required to dismiss, from *his employment*, all incompetent or unfaithful persons. In this we may observe, that the statement, that the city had a general power over the men employed by the contractor, is too broad, for the contract is, that *he* shall dismiss, from *his employment*, incompetent or unfaithful employees. Herein the fact of his superior and independent control over the workmen is recognized, for if the city retained this power, why contract with Grant for the doing of that which it could, at any time, do itself? Finally, we have this provision: "All work to be commenced and carried on at such times, and in such places, and in such manner as the engineer shall direct." The court below laid especial stress upon that clause, in the above specification, which gives the engineer the power of directing the *manner* in which the work should be done, and, in this, it is supposed to be borne out by an expression made by Judge STRONG, in *Painter v. The Mayor of Pittsburgh*, 10 Wright, 213, as follows: "It is further ruled, that a clause in the contract, by which the contractor engaged to conform the work to such further directions as might be given by the street commissioner, did not affect the case; that it only gave the corporation the power to direct the *results* of the work, without any control over the *manner* of performing it, which control, alone, furnishes a ground for holding the master or principal for the act of a servant or agent." But the word *manner*, in

the above quotation, is evidently considered as having a meaning so general as to reduce the contractor to the grade of a mere servant or agent. *Manner* must, in such case, mean the power to control the work, not only as to its character, but also to the particular means used to accomplish it. This must needs be so, for as we have seen in the case of *Reed v. Allegheny*. 29 P. F. Smith, 300, a stipulation for general supervision of the work does not reduce the contractor to the grade of an agent, although necessarily, in such case, the engineer must, to some extent, control the manner in which the contract is performed. It is quite obvious that the word *manner* must be construed with reference to the contract in which it is found. By the agreement under consideration, the work was not only to be done in such manner, but at such times and in such places as the engineer shall direct; if this were the whole of the contract the matter would be of easy solution; but turning to the body of the contract, we find that Grant was bound to begin the work on or before the 25th of October, and to finish it by the 25th of December following, so that the engineer's directions as to time must be limited by the periods thus expressed. So as to place; that is fixed between certain points on State street, and whilst the engineer might direct that the work should be done on either side or in the middle of that street, as he might think would best subserve the public welfare, his directions that the work should be done on some other street, or even beyond the points indicated on State street, would be utterly nugatory. Just so with reference to the manner in which the work is to be performed; that is carefully prescribed in the specifications, and within these prescriptions the engineer may direct, but not beyond them. If he does require and direct something which is not found therein he must then act as arbiter between the contracting parties, and fix the rate of compensation for the work thus required, and that rate becomes part of the contract. This, in itself, exhibits two independent contracting parties who have provided themselves with an arbiter to settle their disputes. It is not thus with mere agents or servants, for they themselves are but parts of the means used by the master to accomplish his design, and that he may choose to alter the theory or plan of the work before it is begun or during its progress is of no moment to them. This contract contemplates the accomplishment of a certain result; the means, so far as they are deemed necessary to give the work its proper character, are carefully speci-

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fled; the province of the engineer was to see that these means were properly applied, in other words, to see that proper materials and methods were used to produce the required result. But in all this the contractor was supreme, for he had but to comply with his contract in delivering to the city a good job according to the terms of that contract. In doing this he was his own master; the city could not direct where he should get his material, how he should bring it upon the ground or how many men he should employ. The city could not fill up the trenches which he dug in the ground designated for the sewer, neither could it erect barricades which he might not tear down if they obstructed his work; he was in the lawful possession of that part of the street which was necessary for the fulfillment of his undertaking, and the city could not dispossess him. We think, therefore, the principle of master and servant is not to be discovered in the contract between these parties, and that the defendant is not within the rule stated by Mr. Justice AGNEW, in *Allen v. Willard*, 7 P. F. Smith, 374, that the liability of the employer of the contractor continues where he has not relinquished his control over the work to be done.

Again it is scarcely open to question, but that Grant himself was responsible for the negligence of those whom he employed about this work. He could not plead that he was but an agent, and that as such he employed the workmen, for in this matter, at least, the city could not control him. These were his own servants who must look to him for their pay and direction; they had no claims against the city and could hold it responsible for nothing; even were they negligent and unskillful they could bid the city defiance until Grant chose to discharge them. If so, then, beyond controversy, Grant was, to these employees, the responsible superior and there could be no other. As we said in *Wray v. Evans*, there cannot be two superiors severally liable for the acts of subordinate agents. This case, therefore, necessarily drops into that class of cases represented by *Painter v. The Mayor*, 10 Wright, 213; *Hunt v. The Pennsylvania Railroad Company*, 1 P. F. Smith, 475; *Allen v. Willard*, 7 id. 374. And *Reed v. The City*, 29 id. 300. In several of these cases this whole subject has been very carefully elaborated, and we need not, therefore, undertake to re-discuss the matter.

Judgment reversed.

NOTE BY THE REPORTER.—The leading case on this subject in New York is *Blake v. Ferris*, 5 N. Y. 48, A. D. 1851, which held that, where persons, having a license to con-

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struct at their own expense a sewer in a public street, engage another person to construct it at a stipulated price for the whole work, they are not liable to third persons for any injury resulting from the negligent manner in which the sewer may be left at night by the workmen employed in its construction. This, it must be noticed at the outset, is not the case of a municipal corporation, having a duty to keep its streets safe for travel. The court at the commencement of the opinion seem to recognize this fact by saying: "It is quite clear that the building of the sewer in question was not a city improvement, carried on by the city officers as a public work."

In the next case, *Pack v. Mayor*, 8 N. Y. 222, A. D. 1853, the same doctrine was applied on the authority of *Blake v. Ferris*, to the case of a municipal corporation, defendant, for an injury occurring from blasting in the grading of a street. MASON, J., says the case is not distinguishable from *Blake v. Ferris*. The opinions are based on the principle of *respondent superior*. The court say: "The contract made between the defendants and Foster to do the job of work in question, according to the doctrine of *Blake v. Ferris*, and the cases which that is supposed to have followed, does not constitute the contractor the agent or servant of the defendants, the employers." And they hold that case is not altered by the condition in the contract that the contractor should conform the work to the direction of the street commissioner and city surveyor. JOHNSON, J., dissented.

Precisely like the last case in every particular, and decided upon the authority of the two preceding cases, is *Kelly v. Mayor*, 11 N. Y. 432, A. D. 1854. The court say: "This right of selection" of workmen "lies at the foundation of the responsibility of a master or principal, for the acts of his servant or agent."

In *Storrs v. Utica*, 17 N. Y. 104, A. D. 1853, it was held that a municipal corporation, owing to the public the duty of keeping its streets in a safe condition for travel, is liable to persons receiving injury from the neglect to keep proper lights and guards around an excavation which it has caused to be made in the street, whether it has or has not contracted for such precautions with the persons executing the work upon contract. The court distinguished *Blake v. Ferris* on the ground that no question of corporate liability or duty then arose. They distinguish the *Pack* and *Kelly* cases on the ground that there "the injuries were caused by the negligent acts of workmen over whom the corporation had no control, and done by them in the actual performance of the very work contracted for. In grading the streets blasting was necessary, but with the manner of doing that the corporation could not interfere," etc. The court then criticise *Blake v. Ferris*, by saying: "The cause of the accident therefore was not in the manner in which the work was carried on by the laborers; if it had been, their immediate employer, and he only, was liable for the injury. But in a sense strictly logical, as it seems to me, the accident was the result of the work itself, however skillfully performed. A ditch cannot be dug in a public street and left open and unguarded at night without imminent danger of such casualties. If they do occur, who is the author of the mischief? Is it not he who causes the ditch to be dug, whether he does it with his own hands, employs laborers, or lets it out by contract?" The court then proceed: "[T]he principles suggested become plain propositions in the case of a municipal corporation which owes to the public the duty of keeping its streets in a safe condition for travel." "Although the work may be let out by contract the corporation still remains charged with the care and control of the street in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend upon the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take those precautions. The contractor may very probably be bound by his agreement not only to construct the sewer, but also to do such other acts as are necessary to protect travel. But a municipal corporation cannot, I think, in this way, either avoid indictment in behalf of the public or its liability to individuals who are injured." ROOSEVELT, J., dissented, and DENIO, J., did not sit.

The foregoing cases have ever since stood as the law of New York. In *McCafferty v. Spuyten Duyvil, etc., Company*, 61 N. Y. 173; s. c., 19 Am. Rep. 237, the whole doctrine was reviewed by the Commission of Appeals, and the doctrine of *Blake v. Ferris* reaffirmed. The prevailing opinion of EARL, C., and the dissenting opinion of DWIGHT, C.,

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contain a learned review of all the cases. The *Storrs* case was distinguished on the ground of the municipal duty to keep the street safe. In the dissenting opinion the *Blake*, *Pack* and *Kelly* cases are distinguished, and the rule is laid down that "where an employer is under a duty or an obligation to another, he remains liable, although that duty is violated by a contractor without his concurrence," and "where the act done is in its nature wrongful from the nature of the case, responsibility cannot be shaken off by the wrong-doer interposing between himself and the injured party the act of a contractor."

In *Creed v. Hartman*, 29 N. Y. 601, following *Congreve v. Smith*, 18 id. 79, it was held that the superior contractor is liable for the negligence of his sub-contractor where the injurious act in the public street was without the authority of the municipality. *INGRAM, J.*, in speaking of the *Blake* and *Storrs* cases, says: "I confess that I have difficulty in understanding how the employer in the one case is liable and not in the other. The digging of a ditch and the blasting of rocks in a public highway are both acts equally dangerous to the traveller, and equally call for care against accidents. The one renders the street unsafe for night travel, and the other during the day."

The doctrine of *Storrs v. Utica* was adopted in *Palmer v. City of Lincoln* (5 Neb. 136), 25 Am. Rep. 470.

See, also, *Cuff v. Newark, etc.*, R. R. Co. (35 N. J. 17), 10 Am. Rep. 205; *King v. N. Y., etc.*, R. R. Co. (66 N. Y. 181), 23 Am. Rep. 37.

In *Homan v. Stanley* (66 Penn. St. 464), 5 Am. Rep. 399, it was held that where the owner of a city lot let parts of the work of erecting a building thereon to different persons, he was himself liable for an injury sustained by a person falling into the excavation which was insufficiently guarded.

On the distinction between intrinsic danger and collateral negligence, see particularly *Pickard v. Smith*, 10 C. B. (N. S.) 470, and *Mersey Docks v. Gibbs*, L. R., 1 E. & I. App. 93, 114, 115, both cited in the dissenting opinion in the *McCafferty* case, *supra*; *Bower v. Peate*, 1 Q. B. Div. 821.

Seammon v. City of Chicago, 25 Ill. 424, is harmonious with *Blake v. Ferris*, but the distinction between municipal and individual liability is not discussed.

In *City of Cincinnati v. Stone*, 5 Ohio St. 83, the city had let a contract for paving a street, to be done under the direction of the city engineer, who was to have entire control over the manner of doing the work, and whose directions were to be obeyed. The contractor left a heap of stones in the street, which caused the flow of surface water on the plaintiff's premises. The city was held liable. In addition to the retention of control, the court say the city had no right to make contracts for the improvement of the streets by which a nuisance should be created on adjoining premises.

The doctrine of *Storrs v. Utica* was approved in the similar case of *Robbins v. Chicago*, 4 Wall. 657, 679; and so of *City of Springfield v. Le Claire*, 49 Ill. 476, and of *City of Detroit v. Corey*, 9 Mich. 165, 187. *Contra*, *Barry v. City of St. Louis*, 17 Mo. 121, A. D. 1852, where the decision was put in part on the singular ground of the avoidance of circuity of action by holding the contractor and him alone liable.

In *City of Joliet v. Harwood*, 86 Ill. 110, the case was for injury caused by blasting in the construction of a sewer in a street. The case showed that the contractors used due care and skill, but the court enforced the rule that where the work is intrinsically dangerous, however skillfully performed, the corporation is regarded as the author of the mischief, and is liable for any injury resulting from it, even if the work is done under contract. Two judges dissented. The only careful consideration was in the dissenting opinion.

In *Lockwood v. New York*, 2 Hilt. 66, one had contracted with the water board of the defendant city to build a sewer, and by the terms of the contract was to remove the "sheath piling"; in doing this an adjacent house settled and was injured, and the defendant was held liable.

Several cases, not of municipal relations, involve the same principle. In *Carmon v. Steubenville, etc.*, R. R. Co., 4 Ohio St. 397, the defendant agreed with contractors for the construction of a part of their road, the contract stipulating, among other things, for the removal of rock by blasting. The contractors proceeding, without carelessness, to blast the rock, a large quantity of the fragments was thrown against the house of an adjoining proprietor, causing damage. The defendant was held liable on the ground that the contractors had done only what they were authorised by the company to do, that the doing of it had resulted in a wrong flowing directly from the act, and not from the manner itself in

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which it was done; and that the defendant was therefore the principal. So, in *Brown v. Peate*, 1 Q. B. Div. 321, A, a proprietor, employed B, a contractor, to tear down and rebuild his house, committing the entire work to B, who assumed the risk of supporting the adjacent house of C, which was entitled to support from the house of A. Lord Cockburn, C. J., held that A was liable to C for the injury to C's house.

In *City of Springfield v. LeClare*, 49 Ill. 478, the court say: "The construction of the sewer by contract did not release the city from the obligation while in process of construction, to have it so carried on as not to endanger the lives or limbs of travellers upon the street. It could have required this of the contractors, and it was negligence to omit it." "There is no charge in this declaration of negligence in not keeping the street in repair, but for permitting the work to be carried on in a street, dangerous in itself, without proper safeguards, and which they neglected to supply." Disapproving *Painter v. Pittsburgh*, 46 Penn. St. 221. The same doctrine was followed in *Blake v. St. Louis*, 40 Mo. 569.

St. Paul v. Settz, 3 Minn. 297, was the case of an unguarded excavation by a contractor, "the work to be under the direction of the street commissioners." Held, that the city was liable. This was founded on the doctrine of *Storrs v. Utica*, as well as on the clause in the contract.

In *Mayor and City Council of Nashville v. Brown*, 9 Heisk. 1, the contractor for paving the street left a heap of sand in the street over which the plaintiff fell. The work was to be done under the direction of the city engineer and to the satisfaction of the street committee." The city was held liable. *Painter v. Pittsburgh*, 46 Penn. St. 221, distinguished on the ground that there the city had no control of the workmen.

In *Dillon on Munic. Corp.*, § 723, the rule is thus stated: "Where the work contracted for necessarily constitutes an obstruction or defect in the street of such a nature as to render it unsafe or dangerous for the purposes of public travel, unless properly guarded or protected, the employer (equally with the contractor), where the injury results directly from the acts which the contractor engaged to perform, is liable therefor to the injured party. But the employer is not liable where the obstruction or defect in the street is wholly collateral to the contract work, and entirely the result of the negligence or wrongful acts of the contractor or his servants." This rule is adopted from *Robbins v. Chicago*, 4 Wall. 657, 679.

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(85 Penn. St. 266.)

Taxation and exemption — churches.

Under a statute exempting from taxation, "churches, meeting-houses, or other regular places of stated worship," "in actual use and occupation for the purpose aforesaid," the land on which a church is in process of erection is not exempt.

A PPEAL from decision of tax commissioners. The agreed case stated: "It is agreed that a cathedral is now being constructed by the Catholics of the Diocese of Erie, on their city lots in Erie, on the corner of Sassafras and Tenth streets, to be known as St. Peter's Cathedral; that said building is not yet completed, and that work on same has been carried on during the last three years

from time to time during each of said years; that under and by virtue of the act of May 14th, 1874, said commissioners have caused said referred-to three lots and the unfinished cathedral thereon to be assessed as other property in the city of Erie, and have refused to exempt said property from taxation because religious services are not held on said premises—said cathedral not being completed, and because it is claimed by them said property is not such property as should be exempt from taxation; that no religious services have been held on said premises except the ordinary services when the corner stone of said cathedral was laid.”

The act of May 14th, 1874, Pamph. L. 158, provides that “all churches, meeting-houses or other regular places of stated worship, with the grounds thereto annexed necessary for the occupation and enjoyment of the same * * * be and the same are hereby exempted from all and every county, city, borough, bounty, road, school and poor tax; provided, that all property, real or personal, other than that which is in actual use and occupation for the purpose aforesaid, and from which any income or revenue is derived, shall be subject to taxation, except where exempted by law for State purposes, and nothing herein contained shall exempt same therefrom.”

The commissioners refused to allow the exemption.

Davenport & Griffith, for plaintiff in error.

D. B. McCreary and Frank Gunnison, for defendants in error.

AGNEW, C. J. If any thing be plain in the Constitution, and the law passed to carry out the second clause of the first section of the eighth article relating to exemptions of churches from taxation, it is that a place of actual religious worship only can be exempted. A marked feature of this clause, which controls its interpretation, is, that no such words were used as churches, meeting-houses, or other, to designate the buildings themselves, but to prevent all doubt, the convention used the words “actual places of religious worship.” In so doing, that body confined the scope of legislative power to the very use itself; thus taking away all excuse for loose interpretation as to the character of the building. It must be a *place of religious worship*. What more definite, to describe the use made of the place—a place, be it church, chapel, meeting-house, or cathedral? The word “place” expresses simply *locality*, not *kind*.

and hence qualifying words were necessary to denote the kind of place; therefore the convention said, "of religious worship." And not content with a single qualifying expression, it prefixed the word *actual* — "an actual place of religious worship." Without religious worship held in it, the place has no character. The convention did not mean to exempt a *place* merely; for this would be unmeaning, without some thing to characterize the place. But when that body said, "an actual place of religious worship," it expressed a general thought, which would embrace all kinds of buildings by simply defining the *use*, which was to be the ground of exemption. The debates in the convention clearly indicate this meaning and hence it was said this language would not include buildings put up for church purposes, as for Sunday schools, lectures, and parsonages.

When we reach the act of 14th May, 1874, passed to carry out the exemption clause in the Constitution, we discover, from its title and its text, the legislature intended to hold to the definition in the Constitution. Thus the title says, "places of religious worship;" and the text says, "all churches, meeting-houses, or other regular places of stated worship." They must be places of *stated* worship. The word "stated" means fixed, established, occurring at regular times, as stated hours of business. So, *statedly* means at certain times, not occasionally. But the legislature was not content with the word "stated," and the word "regular" was prefixed, and the sentence became, "regular place of stated worship." It would be hard to find language that more clearly defines the use, which is the ground of the exemption.

It is thus clear, from both the Constitution and the law, it is the use, not the building, which defines the exemption. But the use which is made of a place is a present fact: not something ideal or in contemplation merely. If religious or public worship have not been held in the place, indeed, *statedly* held in it, the place itself has not a character. At some day, distant or near, it may be intended to be used for stated public worship, but the fact that it is not now used strips it of its only title to exemption. This cathedral, a misnomer, indeed, for it is only an unfinished structure, intended to become a cathedral, has been in the course of construction several years, and when it will be finished and used for religious worship we know not. The great cathedral on Eighteenth street, in the city of Philadelphia, was many years in progress before it

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was finished — probably twenty. A building intended for a church may never be finished, or its use may be changed. On what principle, under the new Constitution, should the property be exempted from taxation before it can be used, when it is the use only which gives it a title to exemption?

An argument is founded on the instance of unfinished court-houses, jails, school-houses, etc. It is inapplicable, however, for these buildings belong to a different branch of the exemption clause. It reads, "exempt from taxation public property used for public purposes, actual places of religious worship, places of burial," etc. The first and second branches are wholly dissimilar. In the former the words "public property" have a wider meaning, and possibly might cover an unfinished building upon it, not yet in use. It might be argued that the property is used for a public purpose when a commencement to build is made upon it. But this cannot be attributed to the expressions "actual place of religious worship," or "a regular place of stated worship," as we have seen it is the use which defines the place or locality used, in order to give ground for the exemption.

It is therefore clear that this unfinished structure, misnamed a cathedral, is not an actual place of religious worship as defined in the Constitution, nor a regular place of stated worship, as described in the law, and is, therefore, not entitled to exemption from payment of taxes. The judgment should be affirmed.

MERCUR, J., dissents.

Judgment affirmed.

HOAG V. LAKE SHORE, ETC., RAILROAD COMPANY.

(35 Penn. St. 298.)

Negligence — remote and proximate cause.

An oil train on defendant's railway was thrown from the track by a recent land slide, and the oil-tanks bursting, the oil became ignited and ran down into an adjoining creek, swollen by recent rains, and flowing down the creek, set fire to and destroyed the plaintiff's buildings three or four hundred feet distant. *Held*, that even if defendants were negligent, the damage was too remote to warrant a recovery.*

* See *Fent v. Toledo, etc.*, R. Co. (39 Ill. 349), 14 Am. Rep. 13; *Kellogg v. Chicago, etc.*, R. Co. (36 Wis. 223), 7 Am. Rep. 63, and note, 80; *Webb v. Rome, etc.*, R. Co. (49 N. Y. 420), 10 Am. Rep. 389; *Atchison, etc.*, R. Co. v. *Stanford* (13 Kans. 354), 15 Am. Rep. 368; *Delaware, etc.*, R. Co. v. *Calmon* (39 N. J. 290), 23 Am. Rep. 214; *Clemens v. Hannibal, etc.*, R. Co. (53 Mo. 305), 14 Am. Rep. 460.

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ACTION for negligence. The opinion states the facts. A verdict was directed for defendants.

Charles W. Mackey, for plaintiffs in error.

McAlmont & Osborn, for defendant in error.

PAXSON, J. This was an action on the case to recover compensation for certain property destroyed by fire, caused, as was alleged, by the negligence of the defendants. The facts, so far as they are essential to elucidate the point in controversy, are as follows: The plaintiffs were the occupiers of a piece of land situated within the limits of Oil City, on the western bank of Oil creek. The railroad of defendants is constructed along said creek, over the land of the plaintiffs and at the base of a high hill. On the afternoon of April 5, 1873, during a rain storm, there was a small slide of earth and rock from the hill-side down to and upon the railroad. About ten minutes prior to the accident, one of the defendants' engines had passed over the road in safety. At that time no slide had occurred. This engine was followed in a few minutes by another engine drawing a train of cars loaded with crude oil in bulk. The latter engine ran into the slide, was thrown off the track, ran on about one hundred to one hundred and fifty feet, when the tender, which was in front of the engine, was overturned into Oil creek; the engine itself was partly overturned; two or three oil cars became piled up on the track and burst. The oil took fire, was carried down the creek, then swollen by the rain, for several hundred feet, set fire to the property of the plaintiff and partly consumed it. The question of negligence in defendants' engineer in not seeing the obstruction and stopping his train before reaching it is not raised upon this record, and need not be discussed. The only question for our consideration is, whether the negligence of the defendants' servants was the proximate cause of the injury to the plaintiffs' property. The answer to the plaintiffs' third point, embraced in the second specification of error, raises this question distinctly. The court was asked to say: "That if the jury believe, from the evidence, that the accident complained of was the result of negligence on the part of the defendants, and that by reason of such negligence, the oil, ignited by the engine attached to the train, ran immediately down to Oil creek, where it was carried by the current in the space of a few minutes to the property of the

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plaintiffs, when it set fire to and destroyed said property, the plaintiffs are entitled to recover, provided they did not in any manner contribute to said accident." The court answered this point in the negative, and then instructed the jury that, as a matter of law, upon the facts in the case, the plaintiffs were not entitled to recover, which instruction is assigned here for error.

It was strongly urged that the court erred in withdrawing the case from the jury, and the recent cases of *Pennsylvania Railroad Co. v. Hope*, 30 P. F. Smith, 373; 21 Am. Rep. 100; and *Raydure v. Knight*, 2 W. N. C. 713, were cited as supporting this view. In the case first cited it was said by the chief justice, in delivering the opinion of the court, "We agree with the court below that the question of proximity was one of fact peculiarly for the jury. How near or remote each fact is to its next succeeding fact in the concatenation of circumstances from the prime cause to the end of the succession of facts which is immediately linked to the injury, necessarily must be determined by the jury. These facts or circumstances constitute the case, and depend upon the evidence. The jury must determine, therefore, whether the facts constitute a succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." The case of *Raydure v. Knight* was meagerly presented; the charge of the court was not sent up, and a majority of the court were of opinion that no sufficient cause for reversing the judgment had been shown. I am unable to see any special bearing this case has upon the question before us. The doctrine laid down in the *Railroad Co. v. Hope*, and to be gathered incidentally perhaps from *Raydure v. Knight*, is, that the question of proximate cause is to be decided by the jury upon all the facts in the case; that they are to ascertain the relation of one fact to another, and how far there is a continuation of the causation by which the result is linked to the cause by an unbroken chain of events, each one of which is the natural, foreseen, and necessary result of such cause. But it has never been held that, when the facts of a case have been ascertained, the court may not apply the law to the facts. This is done daily upon special verdicts and reserved points. Thus, in the *Railroad Co. v. Kerr*, 12 P. F. Smith, 353; 1 Am. Rep. 431, a case bearing a striking analogy to this, the court submitted the

question of negligence to the jury, but reserved the question of proximate cause upon the undisputed facts of the case. Of course this could not have been done if the facts were in dispute. A reserved point must be based upon facts admitted in the cause or found by the jury. In questions of negligence it has been repeatedly held that certain facts when established amount to negligence *per se*: *Railroad Co. v. Stinger*, 28 P. F. Smith, 219; *McCully v. Clarke*, 4 Wright, 399; *Pennsylvania Railroad Co. v. Barnett*, 9 P. F. Smith, 259; while in *Raydure v. Knight*, *supra*, the court below, in answer to the defendants' second point, instructed the jury that if certain facts were believed by them, the negligence complained of was the proximate cause of the injury to plaintiff's property. This ruling was affirmed by this court. I do not understand the decision in the *Railroad Co. v. Hope* to be in conflict with this view. It remains to apply the principle to the case before us. There is not a particle of conflict in the evidence, so far as it affects the question of proximate cause. This was doubtless the reason why the plaintiffs assumed the facts in their third point. They would not have been justified in doing so had not the facts been admitted, nor is it likely the learned judge would have answered it. We may, therefore, regard the plaintiff's third point as a prayer for instructions upon the undisputed facts of the case. Can it be doubted that the court had the right to give a binding instruction? We think not.

But one question remains. Was the negligence of the defendants' servants, in not seeing the land-slide, and stopping the train before reaching it, the proximate cause of the destruction of the plaintiff's property? We need not enter into an extended discussion of the delicate questions suggested by this inquiry. That has been done so fully in two of the cases cited as to render it unnecessary. A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum*, so far as it applies to the practical business of life. We think this difficulty may be avoided by adhering to the principle substantially recognized in *The Railroad Company v. Kerr*, and *The Railroad Company v. Hope*, *supra*, that in determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence — such a consequence as, under the surround-

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ing circumstances of the case, might and ought to have been foreseen by the wrong-doer as likely to flow from his act. This is not a limitation of the maxim *causa proxima non remota spectatur*; it only affects its application. There may be cases to which such a rule would not apply, but this certainly is not one. It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the land-slide. The obstruction itself was unexpected. An engine had passed along within ten minutes, with a clear track. But the obstruction was there, and the tender struck it. The probable consequence of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil-tanks; the oil taking fire; the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream by means of which, in part at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to apply, and might have made the defendants responsible for the destruction of property for miles down Oil creek. The water was an intervening agent, that carried the fire, just as the air carried the sparks in the case of the *Railroad Company v. Kerr*. It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiff's building. The learned judge ruled the case upon sound principles, and his judgment is affirmed.

Judgment affirmed.

DORSEY V. ABRAMS.

(85 Penn. St. 209.)

Negotiable paper — certification of check not in usual course of business.

A. drew upon a bank in which he had no funds a check reciting that it was "to hold as collateral," etc. The cashier certified it. *Held*, that the bank was not bound by such certification, the check manifestly not being in the usual course of banking business.

ASSUMPSIT. The opinion states the facts. Judgment for defendants.

Corbett & Clark and Knox & Moffett, for plaintiff in error.

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James Campbell, Wilson & Jenks and David Lawson, for defendants in error.

PAXSON, J. This was a suit brought against the defendants, an unincorporated banking association, to recover the amount of a check held by the plaintiff, a copy of which is here given :—

“No. EAST BRADY, Pa., Dec. 30, 1875.

Citizens' Savings Bank, East Brady, Pa., pay to P. Dorsey, Esq., or order, two thousand dollars.

To hold as collateral for 1000 P. T.

oil, pipage paid to Jan. 4, 1876.

} A. W. McCULLOUGH.

Good when properly indorsed.

J. Y. FOSTER.

Indorsement on back of check.

P. DORSEY.”

The J. Y. Foster who certified the check is the cashier of the defendants' bank. It was alleged upon the trial, and there is evidence tending to prove, that the certificate of Mr. Foster was a forgery. The plaintiff contended that if a forgery, Mr. Foster had recognized and confirmed it by his subsequent acts and declarations. We do not regard the question of the alleged forgery as an important element in the discussion of the case. It was conceded that at the time McCullough drew the check upon the bank, he had no funds there and no right to draw. It is also apparent that the check was entirely out of the usual course of banking business. This is plain from the face of the instrument. Instead of being a mere order upon a bank to pay a certain sum of money to a person therein designated, or to bearer, it has the significant indorsement in one corner, “to hold as collateral for 1000 P. T. oil,” etc. This indicates plainly that the check was given merely as collateral security for the delivery of the oil. If any doubt could exist upon this point it is put at rest by the testimony of Dorsey (plaintiff) himself. He says: “The first check was given for borrowed oil; if the oil was not returned the check was to be paid; that check was carried for thirty days; supposed it was all right and not forged; the second check was taken when oil was advancing, and I would not extend the check without he would give me a check which would secure me for the return of the oil.” If the certificate of Foster that the check was “good when properly indorsed” is to bind the bank, then the cashier has made the

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bank security for the delivery of 2,000 barrels of oil. This he could not do without authority. It is an act entirely outside of any of the ordinary, recognized duties of the cashier of a bank. There is not a word in the evidence to show that the defendants or any of them knew of this transaction, much less sanctioned it. An attempt was made to show a similar course of dealings by the bank as to prior transactions, that is to say, to certify checks drawn without funds, to be held as collateral for oil. It was not successful, however. The checks certified were what the witnesses call "straight checks," by which we understand commercial checks for the payment of money free from clog or condition. As to such checks it is not perhaps outside of the line of a cashier's duties to certify them when requested, and the drawer has the funds in the bank. It has been decided that he has a right to make such a certificate by virtue of his office. *Cooke v. The Bank*, 52 N. Y. 96; 11 Am. Rep. 667. The effect of such a certificate we need not discuss, as the question is not before us. Nor need we consider at length the proposition that the plaintiff was a *bona fide* holder for value. The face of the check was noticed that it was not drawn in the usual course of business; that it was not a commercial check. The plaintiff's own testimony shows, as we have seen, that he was to hold it only as security for the oil. He had no right to draw the money upon the check until default in the delivery of the oil. There was ample to put him upon inquiry as to the authority of the cashier.

We are of opinion that the learned judge of the court below was entirely accurate in his rulings embraced in the first assignment. This practically disposes of the case. We may say, however, in regard to the fifth assignment, that the point referred to was not based upon any evidence in the cause. There was no error therefore in declining to answer.

Judgment affirmed.

SAFE DEPOSIT COMPANY V. POLLOCK.

(35 Penn. St. 391.)

Negligence — safe deposit company — evidence.

A safe deposit company for hire undertook to "keep a constant and adequate guard and watch over and upon the burglar proof-safe," rented by plaintiff, and to protect its contents from dishonesty of the company's employees. Some bonds which the plaintiff had deposited in the safe disappeared. *Held*, that the company was bound to explain their absence.

ACTION for negligence. The opinion states the case. Plaintiff had judgment.

M. W. Acheson and J. S. & A. P. Morrison, for plaintiff in error. The defendant was not, properly speaking, a depository. Evidence that the goods are missing when called for, does not of itself establish negligence in the bailee. *Gilbart v. Dale*, 5 Ad. & E. 543; *Midland Railway Co. v. Bromley*, 33 Eng. Law and Eq. 235; 17 C. B. 372; *Harris v. Packwood*, 3 Taunt. 267; *Marsh v. Horne*, 5 B. & C. 322, 327.

Thomas M. Marshall, John H. Bailey and Christopher Magee, for defendant in error.

MERCUR, J. This action was brought against the plaintiff in error to recover for the loss of some government bonds. Its general business is indicated by its name. It took two classes of risks; in one class it became the absolute guarantor of the safety of the deposit; in the other its liability was qualified and restricted. The present case arose under the latter class. The defendant in error rented a safe in the burglar-proof vault of the company, subject, *inter alia*, to the following rules and regulations:

"Whenever a party rents a safe, and deposits therein at pleasure, contents not being made known to the company, its liability is limited:

"1. To the keeping of a constant and adequate guard and watch over and upon the burglar-proof safe.

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"2. To the prevention of access by any renter to the safe of any other renter.

"3. To the protection of safes and contents from any dishonesty on the part of any of the company's employees."

He renewed the lease annually several times and paid the required rent. The safe is closed by an iron door, to which a lock is attached. The valuables are placed in a tin box, made to fit into the safe like a drawer. In this box and safe he placed several thousand dollars in government bonds, and had the exclusive possession of the keys to the safe.

As the interest fell due on the bonds, he took them out, cut the coupons therefrom, and replaced them in the safe and locked it again. Finally, on taking out the envelope containing the bonds; for the same purpose, he discovered that four bonds, two of \$1,000 each, and two of \$500 each, had disappeared therefrom. The jury have found that he put them in the safe and did not remove them therefrom.

There was no evidence that the vault or safe had been broken nor that the lock had been tampered with. These facts being unquestioned, and the bonds having been taken from the safe, it necessarily follows that it had been opened with a key suited to the lock. In order to get access to the safe a person would be obliged to step into the vault. If he entered during business hours one key would enable him to procure the bonds. If at other hours it would require two keys to reach them from the office. The fact that the bonds were taken under these circumstances, was certainly some evidence that the company had not kept "a constant and adequate guard and watch over and upon the safe," as by its agreement it was bound to do. It further agreed to prevent the access of any other renter to the safe of the defendant in error, and to protect his safe and its contents from any dishonesty of the company's employees. If any third persons were given access to the vault under circumstances that would have enabled them to unlock the safe and remove the bonds, and they had so done, although a contingency not provided for in the agreement, yet it cannot be pretended that it would not be evidence of a want of ordinary care. So, if the bonds were purloined by either renter or employee, it was certainly evidence to go to the jury of an omission on the part of the company to exercise that ordinary care and vigilance which men ordinarily exercise and ought to exercise under such circum-

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stances in the protection of their own property. The vault and the safe were in the possession and under the protection of the company. The manner in which the bonds were most probably taken shifted the burden of proof. It threw upon the company the necessity of making some explanation to rebut its *prima facie* negligence. The case is not like *Finucane v. Small*, 1 Esp. 315, in which there was no expressed agreement as to the care to be exercised. Nor is it like *Farnham v. Camden and Amboy Railroad Co.*, 5 P. F. Smith, 53, where it was held that proof merely of loss was not sufficient to put the bailee on his defense. The evidence in the present case of the defendant in error did not stop with merely showing the loss. It showed the bonds had been abstracted by some one entering the vault, and opening the safe by means of a key. The presumption of want of ordinary care was thereby created. All the evidence calculated to rebut that presumption was fairly left to the jury by the learned judge.

The other assignments have no merit, and were not urged in the argument.

Judgment affirmed.

 BIDWELL V. CITY OF PITTSBURGH.

(85 Penn. St. 412.)

Estoppel.

A party who signs a petition asking for the enactment of a municipal ordinance for the grading and paving of a street; and who is elected and acts as one of the commissioners in the performance of the work, selling the bonds of the city and expending the proceeds in the work, and in assessing the property benefited, including his own, is estopped from denying the validity of the act of the legislature by virtue of which the ordinance is passed or of the mode of assessment thus adopted.*

SCIRE FACIAS to recover cost of grading a street in front of defendant's lot. The opinion states the facts.

T. Mellon, D. Bruce, and M. A. Woodward, for plaintiff in error, cited *Seeley v. City of Pittsburgh*, 1 Norris, 360; *Washington Ave-*

* See *Petition of Sharp*, (56 N. Y. 207), 15 Am. Rep. 415; *City of Burlington v. Gilbert* (31 Iowa, 366), 7 Am. Rep. 143.

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see, 19 P. F. Smith, 361; *Hammett v. City of Philadelphia*, 15 id. 151. To constitute an estoppel at least three ingredients seem to be necessary: 1st, misrepresentation, or willful silence by one having knowledge of the fact; 2d, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done; and 3d, that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively. *Commonwealth v. Moltz*, 10 Barr, 527; *Eldred v. Hazlett's Adm'rs*, 9 Casey, 307; *Helser v. McGrath*, 2 P. F. Smith, 534; *Miranville v. Silverthorn*, 12 Wright, 149; *Dezell v. Odell*, 3 Hill, 215; Bigelow on Estoppel, 9, 473, 480; Herman on Estoppel, § 325, etc.; *Alexander v. Kerr*, 2 Rawle, 90; *Brown v. Spalding*, 1 Pitts. 361; *Hill v. Epley*, 7 Casey, 331; *Crest v. Jack*, 3 Watts, 240; *Epley v. Witherow*, 7 id. 163; *McCormick v. McMurtrie*, 4 id. 195; *Wilton v. Harwood*, 23 Me. 131; Bispham's Prin. of Eq., §§ 288-9; *Baring v. Corrie*, 2 B. & Ald. 137; *Maans v. Henderson*, 1 East, 335.

D. T. Watson and *T. S. Bigelow*, city solicitor, for the city.

MERCUR, J. [After some minor considerations.] As the first step toward procuring this improvement, a petition, to which the name of the plaintiff and twenty-seven other names were subscribed, was presented to the councils of the city of Pittsburgh. It declared the petitioners were the owners of a majority in interest of the property abutting on Ellsworth avenue, and that they desired to avail themselves of all the privileges of the act of 2d April, 1870, and asked for the passage of an ordinance directing the grading, paving and curbing of the same, and authorizing the election of commissioners. To this petition was added the affidavit of the plaintiff and two other signers thereof, averring the petition to be signed by the owners of a majority in interest of the property abutting on the avenue, and that the signatures were the genuine signatures of the petitioners.

The court substantially charged the jury that if they found the plaintiff in error signed the petition asking for the ordinance directing the grading and paving of Ellsworth avenue, under the Penn Avenue Act; that in pursuance thereof the ordinance was passed; that he was duly elected one of the commissioners, and acted as such in directing and superintending the work, selling the bonds

of the city, expending the proceeds thereof on the street, and in making the assessments upon the properties, including his own, for which this suit was brought, he was estopped from denying the validity of the act, or its application to Ellsworth avenue, or the legality and validity of the mode of assessment provided in the act.

It is not alleged that the evidence of these facts was insufficient to submit to the jury, nor that its finding thereof was unjustified. Conceding the facts, it is contended by the plaintiff in error that they are insufficient to prevent his alleging the unconstitutionality of the act for the purpose of relieving himself from its operation.

In *Pickard v. Sears*, 6 Ad. & EL 469, a leading case of estoppel by conduct, it was said "the rule of law is clear that where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

It may now be declared as a general rule, that where an act is done, or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what otherwise would be mere matter of evidence. It is not necessary that the party against whom an estoppel is alleged, should have intended to deceive; it is sufficient if he intended that his conduct should induce another to act upon it, and the other, relying on it, did so act. Bisph. Eq., § 290.

Prior to the presentation of the petition of the plaintiff in error, the city authorities had taken no steps toward the improvement of Ellsworth avenue. In fact, under the act they had no power so to do. The power was called into action by the petitioners. They asked to have the avenue brought under the operation of the act. They voluntarily asked for the privilege of becoming subject to all its provisions. They asked for the passage of the ordinance directing the work — for the assessment of their lands according to the frontage rule, in order to pay the bonds to be given to raise money to make the improvement.

The authorities acceded to the request. They altered their previous position. They assumed the large additional indebtedness, relying upon the words and conduct of the petitioners. The latter

declared they would submit themselves to all the charges and responsibilities imposed by that act. They willfully caused the authorities to believe this as a matter of fact. So believing, the authorities acted upon it. They accepted the offer in the terms in which it was made. The petitioners directed the work. They received and enjoy the benefits. To now permit them to deny the truth or the efficacy of the assurance given, and continued during the progress of the work, would work a fraud on the city, which cannot be sanctioned.

It is true every one is presumed to know the law, and knowledge thereof is said to be equally open to all. Conceding that the city had knowledge of the law, or ought to have had it, the like legal presumption applies to the plaintiff in error, and his equities derive no strength from that presumption. The city had no reason to believe that he would allege any invalidity in the law which he was praying to have extended over him. The city was misled, not by expressive silence merely of the plaintiff in error, but by his decided and persistent action. It has been held that where a party has acted upon a particular construction of a contract which has been acquiesced in by the other, the latter is estopped from contesting it as the proper construction. *Mercer Mining and Manufacturing Co. v. McKee*, 27 P. F. Smith, 170.

The constitutional right against unjust taxation, which the plaintiff in error invokes, is given him for the protection, of his private property. He may waive that protection, and consent to such action in regard to it as would otherwise be invalid. Having consented, and the other party having acted thereon, and made expenditures and incurred expense predicated thereon, the consent cannot be withdrawn. Hence, an act appropriating the private property of one person for the private purpose of another on compensation made, was held valid when he whose property was taken assented thereto, and receiving the compensation awarded was a sufficient assent. *Cooley on Const. Lim.* *181.

The valid waiver of constitutional rights both of person and of property is of frequent occurrence. The Constitution guarantees the right of trial by jury to one charged with a crime, yet he may waive that right and plead guilty in a case where his life will pay the penalty. So his private property may not be taken for a public highway without compensation paid or secured, yet he may just as effectively divest his right by a voluntary dedication to the public followed by acceptance and expenditure.

It is objected that inasmuch as some lands abutting on this avenue may not be held liable to the specific tax for grading and paving the same, in consequence of the owners thereof not having subjected themselves to the application of an estoppel, and in that case a portion of the cost of the improvement will fall on the tax payers generally, of which the plaintiff in error is one, it would be unjust to impose on him this special tax in addition thereto. We are unable to see any force in this objection. His own direct action has charged his land with this special tax. If one of the consequences of that action has been to throw a portion of the cost of the improvement on the tax payers generally, on what principle ought he to claim exemption therefrom? He has not derived less benefit than they from this improvement. No voluntary act of theirs caused the expenditure. Why, then, shall he not bear his share of the obligation, which his voluntary action has created and not cast it wholly on others? As, then, a portion of any general tax levied for this purpose would justly fall on him, it cannot furnish any ground for relieving his property from the payment of the special tax. If so relieved, his conduct would have the effect of imposing larger taxation on others, and thus work still greater injustice.

Numerous authorities sustain the conclusion at which we have arrived. Among them are: *City of Burlington v. Gilbert*, 31 Iowa, 356; 7 Am. Rep. 143; *Story v. Furman*, 25 N. Y. 230; *Tash et al. v. Adams*, 10 Cnsh. 252; *Ferguson v. Landram*, 5 Bush, 233; *Motz et al. v. City of Detroit*, 18 Mich. 528; *Lee v. Tillotson*, 24 Wend. 337; *The People v. Murray*, 5 Hill, 468; *Mayor of Pittsburgh v. Scott*, 1 Barr. 309.

Whether other property on Ellsworth avenue has or has not become liable to assessment under the Penn Avenue Act is not a question now before us. The bonds issued by the city for the improvement of various streets under that act amount to about five millions of dollars. It may be that all who passively enjoyed the benefits of the improvements may not be liable to specific assessments to pay the bonds under the act; yet it by no means follows that the plaintiff in error is discharged from his obligation. *City of Burlington v. Gilbert*, *supra*; *Kellogg v. Ely*, 15 Ohio St. 66. The conduct or action of each may determine his own liability where the law would not otherwise make him liable. We discover no error in the record.

Judgment affirmed.

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HARTTRANFT'S APPEAL.

(85 Penn. St. 433.)

Constitutional law—power of grand jury to compel attendance of governor by subpoena.

The governor is the absolute judge of what official communications to the executive department may be revealed, and of what the official duties of that department are, and when they should be performed.

The governor and the subordinates of the executive department, while engaged in official duties, are not subject to the subpoena of the grand jury.* (See note, p. 671.)

CERTIORARI on attachment to compel attendance of witnesses before the grand jury. The parties attached were John F. Hartranft, governor of the Commonwealth; M. S. Quay, secretary of the Commonwealth; James W. Latta, adjutant-general of the Commonwealth; General R. M. Brinton and Major A. Wilson Morris. The subpoena was issued October 1, 1877, and was as follows:

“We command you, that, laying aside all business and excuses whatsoever, you and each of you be and appear in your proper persons before our grand jury, at Pittsburgh, at our Court of Oyer and Terminer and Quarter Sessions, there to be held for the county aforesaid, forthwith, to testify all and singular those things which you shall know touching a certain investigation now being had on formal presentment by and before the said grand jury, relating to the late riots of July last in our said county, in our said court depending, and then and there to be tried, between the Commonwealth and ———, defendant, on the part of the ———. And hereof fail not, under penalty of one hundred pounds.”

Thomas M. Marshall, Lyman D. Gilbert, deputy attorney-general, and George Lear, attorney-general, for appellants.

E. A. Montooth, district attorney, Morton Hunter, assistant district attorney, S. A. McClung, and George Shiras, Jr., contra.

* See *State v. Warmoth* (22 La. Ann. 1), 2 Am. Rep. 712; *Mauran v. Smith*, (8 R. I. 122), 5 Am. Rep. 564, and note, 572; *State v. Warmoth* (24 La. Ann. 351), 13 Am. Rep. 126; *People v. Governor* (30 Mich. 380), 18 Am. Rep. 89.

GORDON, J. Grand juries have the power to make presentment, not only of such criminal offenses as may be laid before them by the district attorney, in the form of bills of indictment, and of such as may come within the personal knowledge of individual members thereof, but also, of all such matters as may be given them in charge by the court. Neither is there any doubt about the power of the court to direct that body to make inquiry concerning affairs which directly affect the public peace and society; among which affairs may be instanced great riots, such as those which recently disturbed the well-disposed citizens of Pittsburgh and its vicinity. Matters of this kind may properly be referred to the consideration of the grand inquest in order that the instigators thereof and the participants therein may be brought to justice; and this is the more necessary, because, in times of public tumult and alarm, private prosecutors may be overawed through fear of personal violence.

Doubtless the proceedings in the case before us are very irregular, since there seems to be a total inversion of the proper order of things. It was the duty of the court, not of the grand jury, first to move in the matter. In a subject of so much importance, and one requiring the exercise of so much care and discretion, the court should have instructed this jury as to what it was to investigate, and in what manner the investigation was to be conducted. Nothing of the kind, however, was done; but the court, having approved its petition, suffered it to proceed to the adoption of its own subjects, after its own methods, and, by this sufferance, it allowed an important public investigation to pass from its own control to that of a body of men, which, as it was governed by no regular instructions, resembled more a committee for the general investigation of public affairs, than a lawful constituent of the Court of Quarter Sessions. This, however, is really of small importance to the matter in hand; neither can the appellants call in question the regularity of the proceedings as between the court and its grand jury; for if they have been properly subpoenaed, and can present no lawful excuse for their want of obedience to the mandate of the Quarter Sessions, they must stand convicted of a contempt, and we cannot help them. The subpoena is the process of the Commonwealth, and there is no doubt about the court's power to issue that process in proper cases.

Our inquiry, then, is limited to two propositions: Were the sub-

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process regular, such as an ordinary citizen would be bound to obey? If so, were the appellants liable to attachment for disobedience to this process? The subpoena we have before us, like the other proceedings in this case, is very irregular. It is, indeed, but a general mandate of the court, ordering the appellants to appear, "to testify, all and singular, those things which they may know touching a certain investigation being had, on formal presentment, by and before the grand jury, relating to the late riots of July last, in said county, in said court depending." It sets forth no case, present or prospective, nor does it state for whom, or at whose instance the defendants were to be subpoenaed. As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The Commonwealth may have this process in any proceeding where its interest is apparent, whether as a suitor or a prosecutor, and so may parties in courts, either civil or criminal; but we have yet to learn that any such right exists in a court, in its mere character as a court, separated from the case which it has in hand. So this, as well as every other compulsory process, must show upon its face that it was issued for some person or party having a right thereto, otherwise it is nugatory and void, and disobedience to its mandate involves no penalty whatever. In the case before us, there was the use of the writ of subpoena, as a mere order of the court, without statement of party or case, commanding the defendants to appear before the grand jury, for the purpose of giving their testimony touching the late riots. If there is any law authorizing such process, we have not been informed of it.

No doubt the court might have directed a subpoena to have issued for the Commonwealth, in any case where the Commonwealth was a party, or where it was apparent it was in some way interested in some case or transaction then depending. So might it have directed a warrant to have issued for the arrest of some one guilty of a crime or misdemeanor, but in such case, no one would contend that the mere blank warrant of the court would, in itself, be sufficient to detain a citizen for one moment; the authority for such warrant must appear upon its face or it is worthless. But the court's subpoena is no more respectable than its warrant; if the

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subpœna exhibit no authority it may be disobeyed with impunity. Now, in the case before us, the Commonwealth was not a party in interest, or, if so, it is not now apparent. It seems, from the petition of the grand jury, that the citizens of the county of Allegheny "were greatly concerned in having a careful investigation of the late riots," but whether they were concerned in bringing the rioters to justice or not, is not stated, though this was the only matter in which the Commonwealth could be concerned. Moreover, as the grand jury was acting under no instruction, it was not possible, even for the court, to know what that jury was doing or intended to do, but, of this, the court should have been informed, before it undertook to interfere with the personal liberty of the citizen by its summary process of attachment, for, as the matter now stands, it is apparent that the subpœna was issued for no tangible cause or party and for no properly defined legal purpose; hence, no one was bound to obey it.

For the purposes of this case, however, we may admit the regularity of this subpœna and that, upon an ordinary citizen, it would have been binding and obligatory, for we regard the question of the liability of the appellants to attachment, in any event, as the prime one of this case. In order to resolve this, we must first understand who the persons are, against whom the court has directed its attachment and for what purpose they have been subpœnaed. They are the governor of Pennsylvania, the secretary of the Commonwealth, the adjutant-general, chief officers of the executive department of the State government, and two officers of the National Guard; the latter subordinates acting under the orders of the former. The purpose for which these officers are subpœnaed is, that the grand jury may be put into possession of any information they may be possessed of, or that may be within the power of their several departments, concerning the military or other means used by them in the suppression of the late riots in the city of Pittsburgh. It will be observed that these persons are subpœnaed for the purpose of compelling a revelation of such things as have come to their knowledge in their official capacities, and which strictly belong to their several departments as officers of the Commonwealth. This is clearly set out in the answer, by the attorney-general, to the application for the attachment, and there has been no denial thereof upon the argument before us. In order to simplify matters, we may treat this case just as though the pro-

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cess, first and last, were against the governor alone ; for if he is exempt from attachment because of his privilege, his immunity protects his subordinates and agents. The general principle is, that, whenever the law vests any person with the power to do an act, at the same time constituting him a judge of the evidence on which the act may be done, and contemplating the employment of agents through whom the act is to be accomplished, such person is clothed with discretionary powers, and is *quoad hoc* a judge. His mandates to his legal agents, on his declaring the event to have happened, will be a protection to those agents. *Vanderheyden v. Young*, 11 Johns. 158, *per* SPENCER, J.

It follows, if the governor, as supreme executive, and as commander-in-chief of the army of the Commonwealth, is charged with the duty of suppressing domestic insurrections, he must be the judge of the necessity requiring the exercise of the powers with which he is clothed, and his subordinates, who are employed to render these powers efficient and to produce the legitimate results of their exercise, can be accountable to none but him. In like manner, if he is constituted the judge of what things, knowledge or information, coming into his department through himself personally or from his subordinates, may or may not be revealed, then such subordinates, without his permission, cannot be compelled to disclose, in court, any such matters or information.

What, then, are the duties, powers and privileges of the governor ? In the language of the Constitution, art. 4, sec. 2, "The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed." Also, same article, sec. 7, "The governor shall be commander-in-chief of the army and navy of the Commonwealth, and of the militia, except when they shall be called into the actual service of the United States." He is, also, invested with the appointing and pardoning powers ; the power to convene the legislature in cases of emergency and to approve, or veto, bills submitted to him by the general assembly. It is scarcely conceivable that a man could be more completely invested with the supreme power and dignity of a free people. Observe, *the supreme executive power* is vested in the governor and *he is charged with the faithful execution of the laws*, and for the accomplishment of this purpose he is made commander-in-chief of the army, navy and militia of the State. Who then shall assume the power of the people and call this magistrate to an account for that which he has done

in discharge of his constitutional duties? If he is not the judge of when and how these duties are to be performed, who is? Where does the Court of Quarter Sessions, or any other court, get the power to call this man before it, and compel him to answer for the manner in which he has discharged his constitutional functions as executor of the laws and commander-in-chief of the militia of the Commonwealth? For it certainly is a logical sequence that if the Governor can be compelled to reveal the means used to accomplish a given act, he can also be compelled to answer for the manner of accomplishing such act. If the Court of Quarter Sessions of Allegheny county can shut him up in prison for refusing to appear before it and reveal the methods and means used by him to execute the laws and suppress domestic violence, why may it not commit him for a breach of the peace, or for homicide, resulting from the discharge of his duties as commander-in-chief? And if the courts can compel him to answer, why can they not compel him to act? All these things, we know, may be done in the case of private individuals; such an one may be compelled to answer, to account and to act. In other words if, from such analogy, we once begin to shift the supreme executive power from him upon whom the Constitution has conferred it, to the judiciary, we may as well do the work thoroughly and constitute the courts the absolute guardians and directors of all governmental functions whatever. If, however, this cannot be done, we had better not take the first step in that direction. We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts. In the case of *Oliver v. Warmoth*, 22 La Ann. 1, it was held (per TALIAFERRO, J.), that, under the division of powers, as laid down in the Federal and State Constitutions, the judiciary department has no jurisdiction over, or right to interfere with, the independent action of the chief executive, in the functions of his office, even though the act he is required to perform be purely ministerial. This is putting the matter on very high grounds, for, in such case, no other office would be exempt from the mandatory power of the judiciary. No case could more forc-

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bly exhibit the extreme reluctance of courts to interfere with the functions of the supreme executive, for the hypothesis put is the refusal of the governor to perform a duty, cast upon him by law, of a character strictly ministerial. We think, however, that the ground upon which this decision stands is substantial; for, as the learned justice well argues, the difficulty arises in the attempt to establish a distinction between ministerial and discretionary acts as applied to the governor, and then to conclude that the former may be enforced by judicial decree; it is objected, however, that the doctrine is unsound in this, that it gives to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive; that this would infringe his right to use his own discretion in determining the very same question; that he must, necessarily, have the unconditional power of deciding what acts his duties require him to perform, otherwise, his functions are trammelled and the executive branch of the government is made subservient to the judiciary. The principle enunciated, in the above stated case, applies with greater force to that we now have under consideration; for if the governor's discretion may not be interfered with, in a matter purely ministerial, much more may that discretion not be interfered with in a case which pertains to his office and duties as commander-in-chief, in the discharge of which, the Constitution makes that discretion his peculiar and absolute prerogative.

Again, the governor, having a proper regard for the dignity and welfare of the people of the Commonwealth, is not likely to submit himself to imprisonment, on the decree of the Court of Quarter Sessions, or to permit his officers and coadjutors to be thus imprisoned. Were we, then, to permit the attempt to enforce this attachment, an unseemly conflict must result between the executive and judicial departments of the government. We need not say that prudence would dictate the avoidance of a catastrophe such as here indicated. On this point, the case of *Thompson v. The German Valley Railroad Co.*, 22 N. J. Eq. 111, furnishes us with a precedent well worthy of our consideration. In that case a *subpœna duces tecum* had been served on the governor of New Jersey, commanding him, by his individual name, to appear and testify before an examiner of the Court of Chancery, and bring with him an engrossed copy of a private statute which had been passed by the legislature, and had been sent to him, as governor, for his ap-

proval. He refused to obey the subpoena, informing the court, at the same time, that he did not refuse out of any disrespect to the court or to the law, *but because he thought his duties required him not to appear or produce the paper required, or to submit his official acts, as governor, to the scrutiny of any court.* It will be seen that the case thus presented is quite as strong as that under discussion; for the governor, upon his own opinion of duty, which, as it will appear, did not accord with that of the court, not only refused to appear or to produce the required paper, but to submit any of his official acts to the scrutiny of the court. An order was granted on the governor, to show cause why he should not appear and testify. After argument, ZABRISKIE, Chancellor, said: "The governor cannot be examined as to his reasons for not signing the bill, nor as to his action, in any respect, regarding it. But there is no reason why he should not be called upon to testify as to the time it was delivered to him. That is a bare fact that includes no action on his part. To this extent, at least, I am of opinion that he is bound to appear and testify. But I will make no order on him for that purpose. Such order ought not to be made against the executive of the State, because it might bring the executive in conflict with the judiciary. If the executive thinks he ought to testify, in compliance with the opinion of the court, he will do so without order; if he thinks it to be his official duty, in protecting the rights and dignity of his office, he will not comply, even if directed by an order. And, in his case, the court would hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed the chief magistrate intends no contempt, but that his action is in accordance with his official duty." If we adopt this opinion as a sound exposition of the law, the case before us is determined; for the matter is left to rest solely on the opinion of the executive, although his opinion be clearly contrary to that of the court. We are inclined to think the conclusion thus reached is wise and discreet; and it is supported by the best text writers of our times. These state the law to be, that the president of the United States, the governors of the several States and their cabinet officers, are not bound to produce papers or disclose information committed to them, in a judicial inquiry, when, *in their own judgment*, the disclosure would, on public grounds, be inexpedient: 1 Greenl. on Ev., § 251; 1 Whart. Law of Ev., § 604. Thus, the question of the expediency or inexpediency of the production of the required

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evidence is referred, not to the judgment of the court before which the action is trying, but of the officer who has that evidence in his possession. The doctrine that the officer must appear and submit the required information or papers to the court, for its judgment as to whether they are, or are not, proper matters for revelation, is successfully met and settled in the case of *Beaton v. Skene*, 5 Hurlst. & N. 838, per POLLOCK, C. B. It was there held, that if the production of a State paper would be injurious to the public interest, the public welfare must be preferred to that of the private suitor. The question then arose, how was this to be determined? It must be determined either by the judge or by the responsible crown officer who has the paper. But the judge could come to no conclusion without ascertaining what the document was or why its publication would be injurious to the public service. Just here, however, occurred the difficulty, that, as judicial inquiry must always be public, the preliminary examination must give to the document that very publicity which it might be important to prevent. The conclusion reached was, that from necessity, if for no other reason, the question must be left to the judgment of the officer.

A like case is that of *Gray v. Pentland*, 2 S. & R. 23. A subpoena had been issued from the court below and served upon Governor Snyder and Secretary Boileau, with a *duces tecum*; a rule was also entered for the purpose of taking their depositions in Harrisburg. They declined to appear in answer to the subpoena, or to permit their depositions to be taken under the rule, and refused to produce the paper or deliver it to the plaintiff. This paper was of very great importance, inasmuch as its production was necessary for the maintenance of the suit pending, the Supreme Court holding that, though it was beyond the plaintiff's power, parol evidence of its contents was not admissible. A motion was then made, on the part of the plaintiff, for a special *subpoena duces tecum* to compel the production of the paper, but this was refused. On argument in the Superior Court this action of the court below in refusing compulsory process against the governor and secretary of the Commonwealth does not seem to have been questioned; on the other hand, it was approved in opinions delivered by TILGHMAN, C. J., and BRACKENRIDGE, J. The latter was, as he said, inclined to think that the governor could not be compelled to produce the paper transmitted to him; that it was within his own discretion to

furnish or refuse it; and this on the ground of public policy. The chief justice observed *inter alia*, that the governor, who best knew the circumstances under which the charge had been exhibited to him, and could best judge the motives of the accuser, must exercise his own judgment with respect to the propriety of producing the writing. Thus the matter is treated as quite beyond the power of the court, and the judgment of the executive is regarded as absolute and final.

We next refer to the celebrated trial of Aaron Burr. Here is the case of one charged with treason; one who, by the express terms of the Constitution, was entitled to compulsory process for obtaining witnesses in his favor. The judge before whom the examination was conducted was JOHN MARSHALL, Chief Justice of the Supreme Court; a man renowned, not only for his legal learning, but also for his judgment and sagacity as a statesman; and the President was Thomas Jefferson, one not likely unduly to exalt executive prerogative or to refuse to the judiciary its just tribute of respect. We may, therefore, presume that, whatever was done by the principal actors in the remarkable judicial drama then in progress, was well done. At the request of the defense a *subpoena duces tecum* was awarded and directed to the president requiring him to appear and bring with him a certain letter from General Wilkinson to himself. He refused either to appear or produce the paper required. On discussion of the question, not whether compulsory process should be awarded against the president, for that was not so much as proposed, but whether the attorney-general should permit the defense to have the examination of a copy of the required letter which had been put into his possession, the chief justice said (as we find it set down in vol. 3, p. 37, Burr's Trial, as published by Westcott & Co., Washington City, 1807): "I suppose it will not be alleged in this case that the president ought to be considered as having offered a contempt to the court in consequence of his not having attended, notwithstanding the subpoena was awarded agreeably to the demand of the defendant; the court would, indeed, not be asked to proceed as in the case of an ordinary individual." We find, also, in vol. 2, p. 536, of the same trial, published by Hopkins & Earle, Philadelphia, 1808, the following recorded as the utterance of the chief justice: "In no case of this kind would the court be required to proceed against the president as against an ordinary individual. The objections

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to such a course are so strong and obvious that all must acknowledge them. * * * In this case, however, the president has assigned no reason whatever for withholding the paper called for. The propriety of withholding it must be decided by himself, not by another for him. Of the weight of the reasons for and against producing it he himself is the judge."

Influenced by this and the other precedents we have cited, as well as by reason and necessity, we are in like manner disposed to conclude that the propriety of withholding the information required by the grand jury must be determined by the governor himself, and the weight of the reasons, influencing him in the conclusion at which he has arrived, is for himself and not for the court to consider.

Furthermore, as the governor is the chief executive of the Commonwealth, and as such embodies the power of the people, for the conservation of the peace and the protection of the rights and property of the citizens of the State, as he is also part of the legislative branch of the government, it must be obvious to every one that there are times when he must be excused from the ordinary process of the courts. We presume it will not be contended that he would be obliged to obey the mandate of a subpoena during the sessions of the legislature when his presence at the capitol is constantly required, or while engaged in the suppression of an insurrection. These, however, do not embrace all his duties as governor; we must, therefore, go one step further, and concede that he is exempt from such process whenever engaged in any duty pertaining to his office. Granting that there may be times when he is not so engaged, and when he might be free to answer to a subpoena, who is to be the judge of his engagements or disengagements? May he be compelled to appear before a court and submit himself to the judgment thereof as to whether his duties, just then, require him to be in his office at Harrisburg, or at the head of the army in the field, or whether he may not have a few days of leisure, during which he may await the will and pleasure of a grand jury? It will be conceded that in all ordinary cases he must himself judge as to what things he must do and what things he must leave undone, and that this is a duty imposed upon him by the Constitution. But how then shall a court, at any time, step in and assume the power of judging for him? This cannot be done except by an unwarrantable assumption of executive prerogative. The same reasoning which brings us to the

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conclusion that the governor is the absolute judge of what official communications to himself or his department may or may not be revealed, in like manner, leads us to conclude that he must be the sole judge, not only of what his official duties are, but also of the time when they should be attended to. The governor, disavowing any disrespect to the court or its process, has answered that, in consequence of his constant communication with the State forces, now in the field, in the disorderly and riotous districts, his time is fully occupied in the discharge of the duties of his office, and that to leave his post would endanger the interests of the public service. This brings us face to face with the question, whether the executive, or the courts for him, are to determine the character of his official duties and the order in which they may be performed. For instance, is obedience to a subpoena one of his duties, and if so, shall he discharge that duty in preference to that which rests upon him as commander-in-chief? The answer to this question is easy; for if the courts can, in any one instance or at any one time, control or direct the executive in the performance of his duties, they may do so in every instance and at all times. We need not waste time in the attempt to prove that this proposition is not allowable; that the governor cannot thus be placed under the guardianship and tutelage of the courts. To the people, under the methods prescribed by law, not to the courts, is he answerable for his doings or misdoings. It is his duty, from time to time, "to give to the general assembly information of the state of the Commonwealth," but it is not his duty to render such an account to the grand jury of Allegheny or any other county. Whilst, therefore, the motives of the Court of Quarter Sessions in granting the process before us, are not to be lightly impugned, yet we have no doubt it exceeded its jurisdiction in attempting to interfere with the executive prerogative.

AGNEW, C. J., and STERRETT, J., dissented.

Let the attachment be set aside.

NOTE BY THE REPORTER. We append some extracts from the dissenting opinion of Chief Justice AGNEW :

" We come now to this immediate question, and the first point to be noticed is the argument that he is exempt from a subpoena because he is a *co-ordinate* branch of the State government. What is co-ordination or *equality of rank*, under the Constitution? It is not the absolute independence of each. If it were, the end would be disorder, conflict, and finally disorganization. It is not absolute superiority each over the others, for then they would not co-exist in unity, as essential parts of the same common whole. The Constitution is the written will of the people, in its entirety, and

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all its parts must necessarily cohere without jarring, in order to effectuate that will. Equality of rank implies no superiority, except in the exercise of the particular function confided to that rank. Co-ordination is merely the vesting of the separate functions of making, determining and executing laws, in different persons, that thereby the union of all in one person or body may not work injury to the public welfare. The assembly cannot try causes or execute process, the governor cannot legislate or decide judicial controversies, and the judges cannot make and execute laws. This is the general distribution of the powers of the government, yet the Constitution itself does not strictly adhere to it. Thus the legislature may make certain inquiries, and try certain cases, *e. g.*, the election and qualification of members, contempts, expulsions. The governor approves or vetoes bills, and the courts superintend and enforce the execution of process. But from the very nature of co-ordination in one and the same government, and the distribution to each branch of its appropriate functions, each is necessarily supreme in its own department, for neither can freely exercise its proper functions if it can be obstructed by the other. For example *the judiciary cannot control or interfere with the discretion of the governor in the exercise of an executive function.* And for the same reason the legislative and executive branches cannot control the appropriate functions of the judicial. If the legislative or executive can oppose or obstruct the exercise of an appropriate judicial power, the purpose of separation is defeated; a practical union takes place in them, and the surrender by the judiciary is effected. One of the appropriate and exclusive functions of the judiciary is the detection, trial and punishment of offenders against the law. On the true principles of constitutional co-ordination, therefore, the governor cannot obstruct this function, and must yield obedience to the judicial branch in this respect as the appropriate and superior repository of the power conferred by the people themselves. When arguments are properly drawn from the distribution of the powers of government among co-ordinate branches their force must be conceded. But when their use is inconsistent with the rights of the people who have made this distribution for their own benefit, the argument is fallacious. Then it flies in the face of the Declaration of Rights (sec. 2, already quoted), "that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness." This right being reserved by the 28th section out of the powers conferred in the Constitution, it follows no use can be made of the distribution of powers prejudicial to their "peace, safety and happiness." The appropriate function of the judiciary being the detection, trial and punishment of offenders, and the inquiry for this purpose by witnesses being the constitutional and legal mode of procedure, it is equally clear the governor, just as any other citizen, being subordinate to the judicial power *in this respect*, must yield his obedience to the process necessary for the exercise of this judicial function. Good government and the welfare of the people demand this.

This superior function of the judiciary is to be seen in another aspect. There never was a time when it has not been engaged in passing upon the acts of both the other branches, in resolving the constitutionality and interpretation of laws, and the regularity of executive acts. This needs no citation of authority. "It is idle," says C. J. GIBSON, "to say the authority of each branch is defined and limited in the Constitution, if there be not an independent power able and willing to enforce its limitation." "From its very position it is apparent that the conservative power is lodged with the judiciary, which, in the exercise of its undoubted right, is bound to meet every emergency." "It has become," he adds, "the duty of the court to temporize no longer, but to resist, temperately, though firmly, any invasion of its province, whether great or small." *De Chastellux v. Patrichild*, 3 Harris, 18. How futile would be the judicial power to punish crime, or vindicate innocence, if the governor having exclusive knowledge of facts bearing upon either, could defy the process of the law at pleasure. To argue that his official character is a ground of denial of obedience, is to rob the people, whose servant he is, of their undeniable right to the due administration of justice, through that department of the government to which they have committed the right of judgment. To say he may be liable in an action for damages is no response. If not bound to appear, no right of action can exist, for he is under no

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duty to the party. If it be a criminal prosecution, there is no party to whom he could respond. So impeachment cannot reach him, for that is no impeachable offense which is no violation of duty. An obligation to answer the subpoena is the postulate in either case. To say he must appear upon an indictment, and need not upon a legal inquiry, is equally unsound. For the inquiry of a grand jury is, as we have seen, the constitutional exercise of the power of the court, in order to try and punish offenders. To discriminate between inquiry and trial, as a question of power, is to emasculate judicial rights, and dethrone those of the people.

And now we may crave aid from other sections of the Declaration of Rights. "In all criminal prosecutions, the accused hath a right *inter alia* to have compulsory process for obtaining witnesses in his favor, and in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage:" Sec. 9. "All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Sec. 11. These may be taken in connection with the 6th sec.: "that trial by jury shall be as heretofore, and the right thereof remain inviolate." Trial as *heretofore*, we have seen, implies inquiry and indictment. Now, the private rights of individuals, as thus enforced, are manifestly not superior to the administration of public justice for the welfare of the people as set forth in the 2d sec., already quoted. Indeed, public rights are in many respects superior to individual rights, and the enforcement of the private right of a speedy trial implies the public duty, as well as right, to prosecute offenders, and consequently the means of doing so. Thus in every aspect the Constitution, as the supreme law, commands the presence of every person, in private or official life, when his testimony is necessary for the due administration of justice. If, then, he be liable to process, and bound to appear, it is a necessary corollary, that he is liable to attachment for his disobedience to the command of the law.

The argument *ad inconvenienti*, that it is necessary the governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy and pleasure. The absence of the governor in the Rocky Mountains, on his way to California, at the time of these riots, is an apposite example. When his presence is needed elsewhere, no court in the State would soil its ermine by a rude assault on his person. In all governments, composed of co-ordinate organs, there will be some friction; but right-minded men, mindful of their just powers, and their own dignity, are ever ready to pour oil on the points of contact.

Coming now to the practical test of the question, let us return to the facts. There were fearful crimes committed on the 21st and 22d of July. These are the undoubted subjects of judicial inquiry in the mode prescribed by law; to wit, through a grand jury. In that unknown and vast multitude of citizens and soldiers, who were guilty? who were innocent? By the 22d section of the Declaration of Rights, it is declared that the "military shall in *all cases*, and *at all times*, be in *strict subordination* to the civil power." The military took many lives—the multitude some. Did the military act under the authority of the civil power? This is one of the first points of inquiry by a grand jury, for it involves the question, whether their acts were murder, manslaughter, excusable or justifiable homicide. Thus the evidence of civil authority becomes essential to the inquiry. Did the governor, as commander-in-chief, command their presence and aid in quelling the violence of the mob? Or was his authority assumed by unauthorized persons? These are questions which the governor alone, as a witness, might be able to answer satisfactorily, by competent testimony in a common-law proceeding. They are not State secrets, but acts of authority in their very nature public, and cannot be concealed from the inquiry of the law. The right of life and public safety are too sacred to be subordinated to any right to conceal the authority by which they are destroyed or jeopardized. If the executive authority was duly given, he neither can nor ought to withhold the knowledge which acquits of crime the military acting under his own orders. Indeed, from the character of our excellent governor, he would not for a moment refuse to come to their rescue, if he believed his duty demanded it. On the other hand, if his authority was unlawfully assumed, or was simulated, or was exercised at the bidding of persons without right

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--an inference which his absence in California very naturally raises--and the military have been involved in an unlawful act, his duty and the rights of the people demand his testimony, that the parties who have thus misled them may be reached. This is no State secret as to them, but its concealment is a crime against society, which no one who knows the governor would attribute to him, if aware of his duty.

At this point the case of *Gray v. Pentland*, 9 S. & R. 23, may be noticed. There the deposition sent to the governor affecting Pentland's character was a privileged communication, and protected by the governor's discretion, for otherwise he might be deprived of necessary information in the performance of official duty. Hence the court in an exercise of sound discretion would not compel its production. But, here the authority of the governor to call out the troops to aid in suppressing a riot is in its nature a public act, and his testimony is necessary to vindicate their rights, or to reach others if unauthorized by him. In every aspect of personal and official duty, the State has a right to the disclosure. A contrary doctrine strikes at the essential and fundamental principles of a free government as set forth in the Declaration of Rights.

Analogies also prove the truth of the general doctrine, that no officer, high or low, is above the demands of justice, or above the process of the law. For example, if the governor's pardon, or other official acts, be forged, or stolen, or procured by fraud or duress, is it possible he is not liable to be summoned before a jury, grand or petit, inquiring into the fact? His deposition cannot be taken before a criminal prosecution. Indeed there is no difference between a civil and a criminal issue, for the power to subpoena him to give his deposition is just as essential. So he is called to perform many acts of statutory duty. Is he exempt from subpoena when any of these acts become the subject of judicial inquiry? And if by courtesy he be permitted to be excused, on what principle does this apply to his chief officers of State? The cases in Pennsylvania abundantly prove that a *mandamus* will lie to them to compel the performance of ministerial duties. *Griffith v. Cochran*, 5 Blinn. 57; *Commonwealth v. Cochran*, 6 id. 456; *Commonwealth v. Cochran*, 1 S. & R. 473. So the court will restrain by injunction. *Mott v. Pennsylvania Railroad Co.*, 6 Casey, 9. Doubtless this court cannot interfere with the discretion of the governor in the performance of any proper executive function, for in that his province is superior. Argument is not needed to prove this, yet it is the great work of the opposite opinion, while no labor is bestowed to vindicate the power of the governor to obstruct the punishment of crime, by a refusal to testify. A subpoena to testify is not an interference with that discretion. It has the force of a summons or notice, not an arrest. This has been decided in two cases. *United States v. Cooper*, 4 Dall. 341, and *Respublica v. Duane*, 4 Yeates, 347. In the former, Judge CHASE said he knew of no privilege to exempt members of Congress from the service of a subpoena, though by the Constitution they are exempt from arrest in all cases except treason, felony and breach of the peace. In the latter case, Judge YEATES, citing a similar provision in the Constitution of the State, held that the service of a subpoena is not an arrest, and that the court may grant an attachment or not according to the existing circumstances. These decisions bear directly on the question before us, for as to members of the assembly there is an express provision against arrest in all cases except treason, felony, breach and surety of the peace, and violation of their oath of office. Now the Constitution makes no exemption whatever of the governor, and he is brought directly within the maxim *expressio vel designatio personarum est exclusio alterius*; Co. Lit. 210, a. The decision in *Respublica v. Duane*, *supra*, is, therefore, strongly in point. But a case exactly in point, decided by that great judge and statesman, Chief Justice MARSHALL, is found in the trial of Aaron Burr for high treason. Vol. 1, pp. 177 to 188. The following points were adjudged: 1. That a subpoena to the president of the United States can be issued. 2. That it can go with a clause of *duces tecum* to bring a letter in the possession of the president. 3. That it can be issued before indictment found. 4. That the refusal of the president is a subject for the exercise of the sound discretion of the court. On page 181 the chief justice, after stating that he is not aware of any decision that a subpoena cannot issue to the president, says that "it is not known ever to be doubted, that the chief magistrate of a State might be served with a sub-

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poena ad testificandum." A prominent feature of that case was that Col. Burr was prosecuted with intense earnestness, I might say bitterness, by the most eminent counsel in the United States (friends also of President Jefferson), who conceded the power to issue the subpoena. The same question arose again on the subsequent trial for a misdemeanor, and the same decision was made. Said Chief Justice MARSHALL: "That the president of the United States may be subpoenaed and examined as a witness, and required to produce any paper in his possession is not controverted." Burr's Trial, vol. 2, p. 535. He then discusses the question of the propriety of compelling the production of the letter of General Wilkinson, stating some reasons very similar to those in our case of *Gray v. Penland*, *supra*, for which a court would refuse compulsory process.

But assuming a case where the court would decline to compel the production of a paper or answer to an oral question, it does not dispense with the governor's attendance for examination, unless no other ground were alleged. But how does the governor know in advance what will be the subject of his examination? *Non constat* that any question will be asked on a privileged matter. If such be asked, he can decline answering and refer the privilege to the court, which will decide it, just as it will the privilege of counsel, without requiring disclosure of the matter itself. Its nature is all the court need know.

Another point may be noticed. It is said the imprisonment of the governor under the attachment would leave the State without a head. The case is hardly supposable, for when the governor knows it is his duty to obey he will do so. Certainly Governor Hartranft is not a gentleman who would be guilty of a voluntary contempt. If voluntarily guilty, he would deserve attachment for the dereliction of the law, which his own oath requires him to see faithfully executed. Impeachment, which has been insisted upon, is a harsher remedy; for the undeniable fact of his refusal to obey the process would be the inevitable ground of removal from office. If, however, his disobedience be involuntary in consequence of pressing official duties, a court which would disallow his excuse would be visited with the highest censure. But assuming a voluntary contempt and imprisonment, still the position is untrue. The State is not without a head, for the 13th sec. of the 4th art. of the Constitution provides: "in case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the power, duties and emoluments of the office for the remainder of the term or until the disability be removed, shall devolve upon the lieutenant-governor." The 14th section provides for the disability of the lieutenant-governor, and devolves these duties on the speaker of the Senate. It is said imprisonment is no disability, which is as much as to say the governor may be in prison in Allegheny county, and at the same time at the seat of government, signing or vetoing bills or performing other duties. If no disability, then the State retains its head. But if the governor be disabled from being in two places at the same time, then the disability brings the 13th section into play, and the State is provided with a constitutional substitute. *Quocunque via data*, there is a chief executive.

It is said the governor is the representative of the people, and therefore not responsible. *This is true of executive duties*, for therein the Constitution, the adopted will of the people, is his warrant of authority; but it is untrue of judicial powers, for therein the judiciary represents the people, by the same warrant of authority; and if he violate the law, which it is the province of the judiciary to enforce by their authority, he is liable to the law. In a government of law instituted by a free people for their own benefit, there is no royal prerogative to do nothing wrong; and therefore there can be no representation of their dignity such as can strike down their law and prevent its administration by its appropriate functionary.

On no ground of the Constitution, law, public justice, State policy, or sound reason, can I discover any exemption of any officer in the State, high or low, from the common duty all citizens owe to the due administration of justice. With these views I cannot consent to rob the judiciary of its constitutional powers, and exalt the executive above the demands of justice and the safety and welfare of the people. I cannot abnegate a power intrusted to me by the people, and will return to them a commission, soon to expire, unsullied by any dereliction of duty, or obsequance at the shrine of unwarranted power."

TURNER V. COMMONWEALTH.

(56 Penn. St. 54.)

Criminal law — alibi — presumptions as to failure to prove.

An instruction to a jury in a criminal case, that an unsuccessful attempt to prove an *alibi* is an attempt to manufacture evidence which always bears against the prisoner, is erroneous.*

INDICTMENT and conviction for murder. The opinion states the point.

William A. Wallace (with whom was *D. L. Krebs*), for prisoner.

Thomas H. Murray, Cyrus Gordon and *William M. McCullough*, district attorney, for the Commonwealth.

GORDON, J. [Omitting other points.] We must also take issue with the learned judge on the rule which he has announced as the governing one in a defense resting upon an alibi. He says: "An alibi is a perfect defense when it is fully, clearly and satisfactorily established, but the burden is upon the person asserting it to establish it." And further on: "If proved it constitutes a complete defense; if not proved, and you think it has not been proved, the attempt to manufacture evidence is a circumstance which always bears against the person. No innocent person is driven to manufacture evidence."

As an abstract proposition, the first part of this instruction might be regarded as correct, for, in the first place, as is said in *Briceland v. The Commonwealth*, 24 P. F. Smith, 463, per AGNEW, J., when a defense rests upon proof of alibi, it must cover the time when the offense is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of murder.

It thus necessarily follows that if the evidence on this point is imperfect it comes to nothing. So, if the case of the Commonwealth rested upon positive and undoubted proofs, it might require like testimony to beget a reasonable doubt and hence less than full, clear and satisfactory evidence would be worthless. The fault, however, with this instruction in the present case, which is one

* See *State v. Hardin* (46 Iowa, 623), 26 Am. Rep. 174.

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depending wholly upon circumstantial evidence, is that, under it, if the testimony fails to reach a strength sufficient to work an acquittal, it is in effect excluded from the case. This is a rule inadmissible in modern criminal jurisprudence; for proof of an alibi is as much a traverse of the crime charged as any other defense, and proof tending to establish it, though not clear, may, nevertheless, with other facts of the case, raise doubt enough to produce an acquittal. We are inclined to think with Mr. Greenleaf (Ev., vol. 1, § 81, b), that the true rule in criminal cases, notwithstanding some decisions to the contrary, is, that the burden of proof never shifts, but rests upon the prosecution throughout, so that in all cases a conviction can be had only after the jury have been convinced, beyond a reasonable doubt, of the defendant's guilt. From this it results that, if from any, or from all the evidence taken together, a reasonable doubt of the defendant's guilt is raised, there should be an acquittal.

The latter part of the instructions above cited is manifestly wrong in this, that the jury are told that the defendant, having undertaken to defend himself on the ground of alibi, must produce evidence sufficient to work his acquittal, or, if not, his failure is in itself evidence of guilt. This is adding a penalty to what may be, not the defendant's crime, but his misfortune — a result that we cannot sanction. Were the defendant detected in an attempt to corrupt witnesses, or to manufacture evidence, it would certainly weigh heavily against him, but his mere failure to prove a given point of his defense is no evidence of such attempt, and it ought not to have been submitted as such.

The sentence of the Court of Oyer and Terminer is reversed, and a new venire is ordered.

Reversed.

GRAMLICH V. WURST.

(36 Penn. St. 74.)

Negligence — excavation on land adjoining highway — trespasser.

A was making an excavation by contract on the land of B, at a point some eighty feet from the street and ten or fifteen feet above its grade. A third person having fallen into the excavation at night, and crying for help, O approached to help him, fell into the excavation and was killed. *Held*, that A was not liable therefor.*

* See *McAlpin v. Powell* (70 N. Y. 127), 26 Am. Rep. 555, and note, 542.

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ACTION for negligence. The opinion states the facts. Judgment for plaintiff.

George W. Dedrick and David W. Sellers, for plaintiff in error.

Walter J. Budd and John B. Dwine, for defendants in error.

WOODWARD, J. John Adam Wurst was killed by falling into a vault which Frederick Gramlich, the defendant below, was employed in excavating on a lot belonging to Adam Miller, on the east side of Thirty-first street, above Jefferson. The work was done under a contract between Gramlich and Miller, and for the purposes of the contract Gramlich had exclusive possession of the lot. Another person had fallen into the vault, and in approaching to aid him in response to his cries for help, it is probable that Wurst met with the accident that caused his death. In falling his head struck the shaft of a cart that was in use in doing the work, and which had been left over night in the excavation.

It was after dark, on the evening of the 13th of February, 1874, that the accident happened. On the morning of that day the roof of an ice-house on a lot of Henry Miller, intervening between Adam Miller's land and Jefferson street, had broken down, and Wurst, who was a carpenter, had been at work at that building during the whole of the afternoon. Michael Gossey, one of the witnesses for the plaintiffs, said he saw him about half past three o'clock on the top of the brewery getting wood down, and Henry Miller said: "Wurst was there before I was, clearing off the roof. It was a little after 12 o'clock when I arrived there. As long as I stood there he was working there; he was there until after 7 o'clock. He was hauling away timber; it was hauled to the north side, between my brewery and the vault Mr. Gramlich was digging." There was an open space between Henry Miller's building and Adam Miller's line, and from the account which the plaintiffs gave of Wurst's employment, during the day, the fact that the excavation was being made must have been known to him, and the situation of the vault when the work ceased that evening must have been within his view. When he fell he was passing from the land of Henry Miller near the rear of Adam Miller's lot, and perhaps eighty feet eastwardly from the Thirty-first street front.

Under these facts—and all of them that are material are gathered from the testimony on behalf of the plaintiffs—what duty did

Gramlich owe to Wurst? The contract for digging the vault was a perfectly lawful one, and it has not been alleged that the work was done otherwise than in the accustomed way. It was all done within Adam Miller's lines. No adjacent land was encroached upon, and no danger to passengers on any highway was created. Indeed, there was no highway to be involved in danger. Thirty-first street, north of Jefferson, had only been opened along the property of Henry Miller, and the surface of Adam Miller's lot at the line of the street was from ten to fifteen feet above its established grade. There was some conflicting testimony as to paths alleged to have traversed the lot, but if there were such paths, they extended eastwardly or north-eastwardly in the direction of a lamp-black factory, and it was not contested that Wurst fell into the vault as he approached it from the southern side. The existence or non-existence of paths across the property was immaterial.

In the ordinary case the jury must pass upon evidence given in support of a charge of negligence. They must do this always when the measure of duty is ordinary and reasonable care, and the standard of the degree of care shifts with the change of circumstances. And they must do it also where essential facts are controverted. But where there is no conflict of testimony, and either the standard of individual duty has been judicially determined, or the rights of owners of property have been judicially defined, the decision of a question of negligence affecting individual action in the one case, or the exercise of dominion over property in the other, becomes the duty of a court. Negligence is to be found upon evidence, and is not to be presumed from the bare fact of the occurrence of an accident on a defendant's land. Gramlich was in the lawful occupancy of the lot on which Wurst was killed, and was engaged in an employment that was entirely legitimate. In the absence of evidence to show the existence of exceptional hazards, he was not required to provide exceptional safeguards. An owner of land may improve it in his own time and in his own way, so that he violates no duty that he owes to any adjacent owner or to the public. A case as old as *Blyth v. Topham*, Cro. Jac. 158, held that "an action doth not lie if a man makes a ditch in his waste, which lies near the highway, into which the horse of another falls; for the ditch in his own soil was no wrong to the other, but it was his fault that his horse escaped into the waste." Where A, who was the owner of a storehouse and lot, left at the rear of

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the storehouse an excavation walled up to give light to the cellar, and B, who, on an alarm of fire, went down to the storehouse, adjoining the house in which the fire was, and entering at the front door, went through the store, and going through the back door, turned off the gangway across the opening and fell in and was injured, it was held that the digging of an open space in the rear of the storehouse by A, upon his own ground, was a lawful act by him, and he had the right to keep it there as an appurtenant right for the use of his property, and B falling in by accident, the same not being near a public street or crossing, gave no right to recover damages from A as a wrong-doer, and B, going there on account of the fire, did not change the rule. *Kohn v. Lovett*, 44 Ga. 251. The law fully recognizes the right of him who, having the dominion of the soil, without malice does a lawful act on his own premises, and leaves the consequences of an act thereby happening where they belong, upon him who has wandered out of his way, though he may have been guilty of no negligence in the ordinary acceptance of the term. It is purely *damnum absque injuria*. *Morgan v. City of Hallowell*, 57 Me. 377. "When an excavation is made adjoining to a public way, so that a person walking on it might, by making a false step, or being affected with certain giddiness, fall into it, it is reasonable that the person making such excavation should be liable for the consequences. But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to me to be different." MARTIN, B., in *Hardcastle v. The South Yorkshire Railway Co.*, 4 Hurl. & N. 67. So where the defendants were owners of waste land which was bounded by two highways, and they worked a quarry in the waste, and the plaintiff, not knowing of the quarry, passed over the waste in the dark and fell into the quarry and broke his leg, and then brought an action for the injury, it was held that the action could not be maintained, as there was no legal obligation in the defendants to fence the quarry for the benefit of the plaintiff, who was a mere trespasser on the land. *Hounsell v. Smyth*, 7 C. B. (N. S.) 731. This rule was laid down by Chief Justice GIBSON, in *Knight v. Abert*, 6 Barr, 472, which decided that though no action lies in Pennsylvania for trespass by cattle pasturing on uninclosed woodland, yet that, not being a matter of right, the owner of the land is not liable for injury sustained by

such cattle falling into a hole dug by him within the boundaries of his land, and left uninclosed. And the opinions of Mr. Justice STRONG, in *The Philadelphia & Reading R. R. Co. v. Hummel*, 8 Wright, 378, and of Mr. Justice SHARSWOOD, in *Gillis v. The Pennsylvania R. R. Co.*, 9 P. F. Smith, 129, illustrated and enforced substantially the same rule.

Reliance has been placed on the case of the *Hydraulic Works v. Orr*, 2 Norris, 332, to support this judgment. The distinction between that case and this is marked and obvious. There the accident happened in a private passage or cartway adjoining a factory, where several kinds of business were carried on in different stories, and was caused by the falling of a heavy platform employed as an inclined plane to move heavy articles into and out of the building. When used it was lowered so as to cover the pavement of the cartway. When not in use, it was raised on hinges that connected one side of it within eighteen inches of the wall, was not fastened at the upper side, and was so nearly at equipoise that slight force only was required to draw it down. The cartway opened from a public street, where people were constantly passing, and children were often at play. There was a gate at the street end, and this was frequently left open. It was so left at the time of the accident, when four children intruded into the cartway, and their thoughtless tampering with the platform resulted in drawing it down upon themselves, and in producing injury to the child of the plaintiffs from which he died. This court affirmed a verdict and judgment for damages in the Common Pleas. No cause was ever more justly decided. It was the case suggested by Baron MARTIN, in *Hardcastle v. The South Yorkshire Railway Company*, of a dangerous appliance adjoining a public way. The children were trespassers, certainly, but then they were children, and the defendants were bound to have regard to the reckless and thoughtless tastes and traits of childhood. The entrance to the cartway was open and unguarded, and the facts in the record showed the strong probability of danger from the structure. It had once fallen against the wheels of a wagon, and when other wagons passed it was held up by hand. Even a trespasser may have redress for negligent injuries inflicted on him. Though he is liable to an action for his own wrong, he does not necessarily forfeit his right of action for injuries he has sustained, as, for example, by falling into a hole newly excavated on a defendant's premises adjoining a public way,

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and rendering it unsafe to persons lawfully using the same with ordinary care. *Barnes v. Ward*, 9 C. B. 392, 420. The owner of open land has no right to plant in it spring guns by which ordinary trespassers may be wounded. *State v. Moore*, 31 Conn. 479. In this country, while a house may be thus protected from burglars, no man has a right to place on his land any instrument to injure persons merely straying on such land. *Johnson v. Patterson*, 14 Conn. 1. A party may be acting in violation of some particular statute and still be under the general protection of the law. *Spofford v. Harlow*, 3 Allen, 176. The *Hydraulic Works v. Orr* rested on principles and precedents that sustained it amply, but which have no application here. The undisputed facts proved the defendant to have been guiltless of all wrong, and the prayer for instruction to the jury that he was entitled to a verdict should have been granted.

Judgment reversed.

CONNECTICUT MUT. LIFE INS. CO. v. GROOM.

(86 Penn. St. 92.)

Life insurance — suicide — insanity.

A life insurance policy, conditioned to be void if the insured shall die by suicide, is not avoided by the self destruction of the assured when insane, although he meant to kill himself and knew that death would result from his acts.*

COVENANT on a policy of life insurance. The opinion sufficiently states the facts. Judgment for plaintiff.

M. Arnold and W. S. Price, for plaintiff in error.

George R. Snowden, for defendant in error.

WOODWARD, J. By the facts agreed upon at the trial, and by the verdict, it was established that James M. Boileau's death was

* See *Phillips v. Louisiana Equitable Life Ins. Co.* (35 La. Ann. 404), 31 Am. Rep. 549; *Van Zandt v. Mut. Ben. Life Ins. Co.* (35 N. Y. 100), 14 Am. Rep. 315; *Cooper v. Mass. Life Ins. Co.* (108 Mass. 227), 3 Am. Rep. 451, and note, 454; *Phadenhauer v. Germania Life Ins. Co.* (7 Helsk. 567), 19 Am. Rep. 623, and note, 628. "Sane or insane," see *Bigelow v. The Berkshire Life Ins. Co.* (U. S. Sup. Ct.), 19 Am. Rep. 623, note.

caused by his own act; that he was insane at the time; that he intended to take his life; and that he knew death would result from the act he committed. The suit was upon a policy of insurance on Mr. Boileau's life, and contained a provision that if he should "die by suicide" it should be null and void. The effect of that provision on the rights of the plaintiff, in view of the established fact of the insanity, has been the point especially in controversy. On the one hand, the ground was taken that the word "suicide" cannot properly be applied to a voluntary death, unless caused by an act done by a person of sound mind, and capable of measuring his moral responsibility for his conduct. On the part of the defendants, it was contended that the word is synonymous with death by one's own hand, simply signifying the killing of one's own self, and that whether he is sane or insane when he kills himself, depends on his knowledge or ignorance of the consequences of the act. The jury were instructed that the clause of forfeiture in the policy would not bar a recovery if they should find Mr. Boileau to have been insane, and that insanity would be made out if they should find that his anxieties and sufferings had "so entirely overpowered his judgment as to render him unable to distinguish between right and wrong."

Undoubtedly the weight of authority—or rather the preponderance of decisions—in England and this country, has been in support of the legal theory of the counsel for the defendants. But it is believed that the class of cases to which the *Mutual Life Insurance Company of New York v. Terry*, 15 Wall. 580, belongs, furnish the safer and better rule. The clause of the policy relied on was not a covenant for the performance of a duty under a mutual contract. It was scarcely a condition even. It was a provision for the absolute forfeiture of the rights of the insured on the happening of the specified contingency. Premiums were paid from the 14th of February, 1872, until the death occurred. To serve the purposes of the defendants, it was requisite that the existence of conditions under which the clause of forfeiture was to have operation, should be clearly, strictly and technically made out. He who receives an instrument, and parts with his money on the faith of it, should have a construction put upon it in his favor, because the words of the instrument are not his, but those of the other party. *Mayer v. Isaac*, 6 M. & W. 612. This principle applies to a condition in a policy of insurance, which, being the language

of the company, must, if there be any ambiguity in it, be taken most strongly against them. *Notman v. Anchor Ass. Co.*, 4 C. B. (N. S.) 491. Generally, in legal acceptance and in popular use, the word "suicide" is employed to characterize the crime of self-murder. It is called "self murder" in terms in Webster, and is defined to be "the act of designedly destroying one's own life, committed by a person of years of discretion and of sound mind." Self-destruction, under insane impulses so strong as to be beyond the control and restraint of the will, is a result produced by disease, for which the victim of it is no more morally responsible than he would be for any other of the maladies of which men die. The disease, when it manifests itself in that form of melancholia, which creates a prevailing propensity to suicide, consists in the unfounded and morbid fancies of the sufferer regarding his means of subsistence or his position in life, or in distorted conceptions of his relations to society or his family, of his rights or duties, or of dangers threatening his person, property or reputation. "When the melancholic hallucination has fully taken possession of the mind," says Abercrombie, "it becomes the sole object of attention, without the power of varying the impression or of directing the thoughts to any facts or considerations calculated to remove or palliate it. The evil seems overwhelming and irremediable, admitting neither of consolation nor hope. For the process of mind calculated to diminish such an impression, or even to produce the hope of a palliation of the evil, is precisely that exercise of mind which, in this singular condition, is lost or suspended, namely, the power of changing the subject of thought, of transferring the attention to other facts or considerations, and of comparing the mental condition with these, and with the actual state of things. Under such a conviction of overwhelming and hopeless misery, the feeling naturally arises of life being a burden, and this is succeeded by a determination to quit it. When such an association has once been formed it also fixes itself upon the mind, and fails to be corrected by those considerations which ought to remove it." Whart. & Stille's Med. Jur., § 206. When the disease attains a stage at which the mental power to judge of the moral nature of the act is entirely gone, self-destruction does not become suicide in the sense of self-murder. Such an act has never involved criminal responsibility and punishment, and it should not be followed, except under express stipulation, by a forfeiture of contract rights. The rule

adopted by WILLARD, J., in *Breasted v. Farmers' Loan Co.*, 8 N. Y. 299, was a safe and just one. "It must occur to every prudent man seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases that may terminate his being. It is said the defendants did not insure the continuance of the intestate's reason. Nor did they, in terms, insure him against small-pox or scarlet fever; but had he died of either disease, there is no doubt that the defendants would have been liable. They insured the continuance of his life. What difference can it make to them or to him whether it is terminated by the ordinary course of disease in his bed, or, in a fit of delirium, he ends it himself. In each case the death is occasioned by a means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by a rational agent, responsible for his act."

But it has been urged that the steps taken by Mr. Boileau to destroy his life were consciously intelligent, and that he knew what the consequence of taking them would be. There is no doubt that he had such knowledge. His very purpose was to kill himself. Such a degree of intelligence may well co-exist with faculties so distorted and a mind so shattered by long-continued suffering as to inspire a morbid impulse, the nature of which the weakened judgment cannot measure, and the execution of which the uncertain and feeble will cannot restrain. Almost every insane man knows that food will satisfy hunger, and that water will quench thirst. He is able to realize that fire will burn him; that blood will follow the blow of a knife, and that he will feel pain if his flesh is torn. And he acts consciously throughout his life on such knowledge. It survives often among the instincts of the man after the intellect is wrecked. But the effect of partial mental aberration is concentrated upon the faculties involved in the disease. In *McElroy's case*, 6 W. & S. 451, HUSTON, J., said, that all treatises on insanity, and most reports of trials relating to insane persons, show that a total loss of reason and memory is unknown to court and physicians, unless in cases of delirium from disease, or absolute frenzy; and yet commissions of lunacy are constantly found, and deeds and wills avoided for insanity. In the opinion the judge quoted the remark of Lord HALE, that "some persons that have a competent use of reason in respect to some subjects are under a particular dementia in respect to some particular discourses,

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subjects or applications." He quoted also from the argument of Mr. Erskine, in defense of Hatfield, the statement which was adopted in the judgment of the court, that "in all cases which have filled Westminster Hall with the most complicated considerations, the lunatics and other insane persons who have been the subjects of them have not only had the most perfect knowledge and recollection of all the relations they stood in toward others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable. The disease consisted in the delusive sources of thought; all their deductions within the scope of the malady being founded on the *immovable assumption* of matters as realities, either without any foundation whatever, or so distorted and disfigured by fancy, as to be nearly the same thing as their creation."

In every respect this cause was determined accurately in the court below. The charge was subject to no valid objection, and the judgment was properly entered for the plaintiff on the point reserved.

Judgment affirmed.

CREED V. PENNSYLVANIA RAILROAD COMPANY.

(36 Penn. St. 129.)

Negligence — railroad company — rights of passenger in caboose.

A person got into a caboose attached to the rear of a mixed freight and passenger train, and while riding there was killed by the negligence of the railway company. The caboose was forbidden to all but employees of the company. The deceased was not such employee, and it did not appear that he paid any fare. *Held*, that the legal presumption was that he was a passenger travelling for a consideration, and the company was liable in damages for his death.*

ACTION of damages for negligence. The action in question occurred from a misplaced switch. The opinion states the other facts. Judgment for plaintiff.

* As to rights of passengers on freight trains, see *Arnold v. Illinois Cent. R. R. Co.* (33 Ill. 272), 25 Am. Rep. 383; *Lucas v. Milwaukee & St. Paul R. Co.* (33 Wis. 41), 14 Am. Rep. 735.

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Pierce Archer, Jr., and Lewis C. Cassidy, for plaintiff in error.

Chapman Biddle, for defendant in error. A passenger by presumption of law is one who takes his seat openly in the place assigned to passengers generally (*Whart. on Neg.*, § 354); is ready and willing to pay his fare when called upon (*Railroad Co. v. Books*, 7 P. F. Smith, 346), and consents to all the reasonable rules of the company for entering, occupying and leaving their cars. *Sullivan v. The Reading Railroad Co.*, 6 Casey, 238; *Railroad Co. v. Zebe*, 9 id. 326. A person on a freight train is not a passenger, and no act of a conductor of a freight train will bind a company, unless it assents thereto. *Eaton v. Delaware and Lackawanna Railroad Co.*, 57 N. Y. 382; 15 Am. Rep. 513; *Lygo v. Newbold*, 9 Exch. 302; *Union Pacific R. Co. v. Nichols*, 8 Kans. 505; 12 Am. Rep. 475.

GORDON, J. From the evidence, it appears that Henry Creed, the husband of the plaintiff, from the death of whom the present action has resulted, was a passenger upon a mixed freight and passenger train of the defendant, running from Jersey City to Philadelphia. At the time of the accident, which resulted in his death, Creed was in the caboose, the hindmost car of the train, immediately in front of which were the passenger cars, so that there was ready and easy access from the latter to the former. This caboose car was one set apart and especially designed for the use and occupancy of the employees engaged in running the train, and by the rules of the company no other persons were permitted to enter it. It is quite clear, from the evidence, that Creed boarded this train at Jersey City, for Brannig, the freight conductor, says he saw him first on the afternoon of November 5, the day of the accident, in that city, and that he next noticed him at Newark in the lookout of the caboose, and as this train left Jersey City in the evening, there can be but little doubt that the deceased got upon it at that point. It is also in evidence, that though Brannig had the full and entire charge of the train from the time it left Newark, yet he had no authority to receive passengers or to examine or lift the tickets of such as remained on the train after passing that station, at which point the passenger conductor, who had charge of the cars from Jersey City, left the train. Whether Creed paid his fare or not is unknown. Brannig's duties did not lead him to

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inquire, and the passenger conductor was not called. He may have had a ticket, or he may have been surreptitiously on the train through the connivance of the train hands, to whom he may have been known, as he formerly had a position on this road. Presumptively he was rightfully there; certainly he was there with the knowledge and acquiescence of one of the conductors, if not of both. Under this condition of affairs the learned judge of the court below charged the jury as follows:

"1. There is no direct proof of negligence on his, Creed's, part, unless it may be considered in connection with the position which he occupied in the cars as riding in the caboose." This point was reserved.

"2. We have no evidence of payment of money by him; but I think there is a reasonable and fair presumption, that if a person, not connected with the company, travels by a passenger train, presumably he is travelling as a passenger and for a consideration." This point was also reserved. The verdict was for the plaintiff; but the court, without giving any opinion, entered judgment for the defendant *non obstante veredicto*. It follows that the converse of one or both of the above propositions was finally held by the court. That is to say: First, that there was a legal presumption of negligence on the part of Creed, arising from the fact of his being in a car when the accident happened not intended for the use of passengers; second, that, although travelling by a passenger train, and not connected with the company, the legal presumption is that he was not travelling as a passenger who had paid his fare, or intended, in good faith, so to do. As legal propositions these cannot be sustained.

No presumption of negligence can arise, either in fact or in law, from the fact of Creed's occupancy of the caboose, for there is no evidence that it was in any degree more unsafe than any other car in the train. It was, indeed, under all ordinary circumstances, the one that was the most safe; from collisions in front of the train it was protected by the cars which preceded it, and from dangers behind, being itself a lookout, it was guarded by the constant vigilance of the employees. That it proved to be the car first in danger, and the one most badly wrecked, argues nothing, since the carelessness of the company in introducing new switches, having an action the reverse of the old ones, without notice to those in charge of its trains, could not be foreseen by any one,

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however prudent. Was Creed's position, under all ordinary circumstances, which a man of ordinary prudence ought to foresee and guard against, as safe as a seat in a passenger car? If it was, and, as we have said, there is no evidence to the contrary, then negligence cannot be predicated of the fact of his being in the caboose. It is true, however, that Creed, as a passenger, ought not to have been in that car; not, indeed, because it was less safe than other parts of the train, but because forbidden by the rules of the company. It was a car provided for the use of the train hands, and not for passengers, and from its very shape and character that fact must have been obvious to any one of common understanding and observation; much more to the deceased, who had himself been a freight conductor upon this very road. Presuming, then, the knowledge of the design of this car by the deceased, which, however, is a presumption of fact, not of law, was the company thereby released as to Creed from its duty as a common carrier? This point was raised and determined in *O'Donnell v. The Allegheny Valley Railroad Co.*, 9 P. F. Smith, 239, in which case the court below held that the baggage car was an improper place for passengers, whether the rule of the company against such use was communicated to them or not, and that one leaving his seat in the passenger coach and entering the baggage car was guilty of negligence. But this ruling was reversed. Mr. Justice AGNEW, delivering the opinion of the court, observed: That whilst it is the undoubted right of a railroad company to prescribe reasonable rules for the regulation of those who travel on its cars, yet the conductor is the one who is charged with their administration, and his permission of, or acquiescence in, the use of the baggage-car by a passenger, exempts such passenger from all blame, and in case of accident to him, resulting from the negligence of the company, he may recover damages. In the case of the *Lackawanna and Bloomsburg Railroad Co. v. Chenewith*, 2 P. F. Smith, 382, the plaintiff had obtained permission from the agents of the company, to attach his freight-car to a passenger train, contrary to the rules of the company, which were communicated to him, he at the same time agreeing "to run all risks." Notwithstanding this, it was held that the company was liable for damages resulting to the plaintiff and his car from negligence in the running of the train. And this is reasonable; for, as was said in that case, the plaintiff's car was not lawfully upon the road, and his engagement to be

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responsible for all risks did not embrace such as arose from the neglect of the defendant's employees.

The test for contributory negligence is found in the affirmative of the question, does that negligence contribute in any degree to the production of the injury complained of? If it does, there can be no recovery; if it does not, it is not to be considered. In this we are also supported by the case of *Carrol v. The New York and New Haven R. R. Co.*, 1 Duer, 571, opinion per BOSWORTH, J. At the time of the accident complained of, the plaintiff, a passenger, was in the post-office part of the baggage-car, and though it was conceded that the position was more dangerous in case of collision than a seat in the passenger-car, yet being injured by a collision to which his position in no way contributed, it was held he was entitled to recover. So, it was pertinently asked by Mr. Justice THOMPSON, in the case of the *Railroad Co. v. Chenoweth*, above cited, "Why speculate about the supposed dangerous position assumed by the plaintiff if no damage resulted from it? Was he to become an outlaw for assuming what proved to be no risk, and so forfeit his right when he was blameless?"

This doctrine applies with much force to the case in hand. Creed was in the caboose with the knowledge and assent of the freight conductor, if we may believe the testimony of that officer; hence he was not a trespasser; and suppose, knowing that this was not a proper place for passengers, he assumed all risks incident to that car by boarding it; what then? Was a carelessly located or misplaced switch such an incident? Or did his position in the remotest degree contribute to the accident? If, however, it did not, why talk about the matter as though it were of importance? This doctrine is further illustrated by the case of *Washburn v. The Nashville and Chattanooga R. R. Co.*, 3 Head (Tenn.), 638, wherein it was held, that the fact that one is riding in the baggage-car, with the knowledge of the conductor, or is riding free, will not preclude him from a recovery for an injury arising from a collision, even though he might, or would not, have been injured had he remained in the passenger-car. A like decision was made by the Supreme Court of Minnesota, in the case of *Jacobus v. The St. Paul and Chicago Railroad Co.*, 20 Minn. 125; 18 Am. Rep. 360, holding that the fact that the passenger, at the time of the injury, was in the baggage-car, contrary to a rule of the company, was not such contributory negligence as would bar his suit, and this though he may

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have been informed of the rule and may have persisted in remaining there in violation of it, if his position did not contribute to the accident which caused the injury. It is manifest, therefore, from reason and authority, that there was nothing in the first point for the court of reserve, but having instructed the jury that there was no evidence of contributory negligence on part of Creed, the matter should have been allowed so to stand.

As to the second point, it was certainly correct to say "that if a person, not connected with the company, travels by a passenger train, presumably he is travelling as a passenger, and for a consideration;" in other words, he is presumed to have paid his fare or to be ready to pay it when called upon. To presume otherwise, would be to presume that such a one was a trespasser; but this is an affirmative proposition, the proof of which rests upon the one alleging it. As the doctrine above stated is expressly ruled in the case of the *Pennsylvania Railroad v. Books*, 7 P. F. Smith, 339, per SHARSWOOD, J., we need pursue this subject no further. The position occupied by the decedent, in the caboose-car, may raise a question for the jury. Creed was upon a passenger-train, and, as we have seen, might lawfully occupy any part of that train, whether passenger-car or caboose, if the conductor, knowing his position, did not object to it. It follows that all presumptions favorable to the occupant of a passenger-car attach in like manner to him though occupying the caboose. It cannot be said that it was no part of the duty of the passenger conductor to visit this caboose, and that, hence, no presumption can arise that Creed paid fare to an officer whom he did not see and who did not see him, for as it is the conductor's duty to visit every part of his train where passengers may lawfully be, we must presume he did his duty. Whilst this is so it does not follow, from the facts developed in this case, that a presumption *de jure* arises that Creed did pay his fare, or that he may not have been a trespasser. That he did not pay his fare to Brannig, the freight conductor, counts for nothing, for he was not authorized to receive it. This fact, however, does prove that if he paid at all it must have been at Jersey City, at Newark, or between those places whilst the train was in charge of the passenger conductor, and as he was first noticed by Brannig, at Newark, in the lookout part of the caboose, and as he may have occupied that position from Jersey City, it is quite possible, or even probable, that he may not have been seen by the passenger conductor, or if

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seen by that officer, may have been mistaken for one of the train hands and so have avoided the payment of fare.

There being this in the case, which ought to be passed upon by a jury, we send it back for re-trial instead of entering judgment on the verdict.

Judgment reversed, and a *venire facias de novo* awarded.

SHARSWOOD and MERCUR, JJ., dissented.

Judgment reversed.

HARRISON V. COLLINS.

(66 Penn. St. 153.)

Negligence — contractor — coal hole open in sidewalk.

The owners of a sugar refinery employed a rigger to remove machinery from a railroad car to their refinery. In doing the work the rigger opened a coal hole in the sidewalk, and left it open a few minutes after the work was finished. A lad fell into the hole and was injured. The rigger was paid by the day, and the owners of the refinery neither directed nor interfered with the manner of the work. *Held*, that they were not liable for the injury.* (See note, p. 702.)

ACTION of negligence. The opinion states the facts. Plaintiff had judgment.

George Junkin and George W. Biddle, for plaintiffs in error.

Pierce Archer, Jr., and Lewis C. Cassidy, for defendants in error. The leaving open the coal hole was a public nuisance, for which the defendants were liable. *Pickard v. Smith*, 10 C. B. (N. S.) 470; 100 E. C. L. Rep. 470; *Whiteley v. Pepper*, 36 L. T. Rep. 588; public nuisance. *Shearman and Redfield on Negligence*, § 84; *McCleary v. Kent*, 3 Duer, 27; *Ellis v. Sheffield Gas Co.*, 2 Ell. & B. 767; *Gray v. Pullen*, 5 Best & S. 970; *Wiswall v. Brinson*, 10 Ired. 554; *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Congreve v. Morgan*, 18 N. Y. 84.

MERCUR, J. This was an action by the defendant in error to

*See *City of Erie v. Caulkins*, ante, p. 642.

recover damages for injuries which he sustained by falling into a coal hole of the plaintiffs in error. They were sugar refiners, occupying buildings on Swanson street, in the city of Philadelphia. They purchased two large iron coolers, to use in their business. The coolers were brought by rail to within about one hundred feet of their works. They then employed John Connor, a rigger, to take the coolers from the cars and place them in their building. He was to be paid four dollars per day for his own services, and for each of his three assistant riggers. On each of these three men he made a profit of fifty cents per day. He was to furnish the ropes, hoisting apparatus, and all the necessary machinery incident to his occupation. Yet for the use of these he appears to have received an additional sum. The distance to move the coolers being so short, he moved them with skids and rollers, over the sidewalk. While so moving them he uncovered the coal-hole, and left it open, by reason of which the defendant was injured. The question presented is, whether the plaintiffs in error are liable for the injury thus sustained.

As one general principle pervades all the assignments, they will be considered together. The learned judge thought it unimportant whether Connor was merely the servant or agent of the plaintiffs, or whether his employment was an independent one; that if he used the hole by either the express or implied permission of his employers, they were liable; or if he used it without their permission, and as a trespasser, and left it open "for any time," after so using it, they were liable. In this we think there was error. If Connor was their mere agent or servant, they would be liable for his negligent manner of performing the work. Yet, if his employment was an independent one, they are not so liable. This distinction has been recognized in numerous cases. Among others may be cited *Painter v. The Mayor, etc., of Pittsburgh*, 10 Wright, 213; *Hunt v. Pennsylvania Railroad Co.*, 1 P. F. Smith, 475; *Allen v. Willard*, 7 id. 374.

It is well settled in England and in this country, that persons not personally interfering or giving directions respecting the manner of the work, but contracting with a third person to do it, are not responsible for a wrongful or negligent act in the performance of the contract, if the act agreed to be done is legal. *Gray & Wife v. Pullen & Hubble*, Law Jour. Rep., vol. 32, part 2, 169, N. S.; *Hilliard v. Richardson*, 3 Gray, 349; *Blake v. Ferris*, 1 Seld. 48;

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Painter v. The Mayor, etc., supra. The fact that the contractor is paid by the day does not necessarily destroy the independent character of an employment. *Forsyth v. Hooper*, 11 Allen, 419; *Corbin v. America Mills*, 27 Conn. 274. If one renders service, in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished, it is an independent employment. *Shearman & Redfield on Neg.*, § 74; *Pack v. The Mayor, etc., of New York*, 4 Seld. 222; *Barry v. The City of St. Louis*, 17 Mo. 121.

In the present case the evidence was most ample to submit to the jury to find that Connor's employment was an independent one. It does not appear that the plaintiffs in error reserved any right to advise or direct as to the manner in which the coolers should be moved, nor that they assumed or exercised any such authority during the progress of the work. It is not pretended that the moving was an unlawful work. As to Connor it was a distinct employment in the line of his occupation. His employers stipulated for the result only. He alone superintended and directed the manner in which his assistant riggers should work. He had the exclusive control and direction of the plaintiffs' men, who assisted him. He testifies that he did the job according to his own views. Under his directions the coal-hole was opened. It is not shown that the plaintiffs in error, or any one acting under their directions, were present, or had knowledge that it was opened. It is not claimed to have been opened by their express authority. How could their permission be implied? We see no necessary connection between the work to be done and the use of this coal hole in performing it. If the jury should think there was no reasonable presumption that Connor would use the hole in such a manner as to uncover it, the plaintiffs in error were guilty of no negligence in not stationing a man there to prevent its being opened.

The coal-hole appears to have been in all respects constructed and protected according to the city ordinance. Its cover was of solid cast-iron, weighing about sixty pounds. At the bottom it was securely fastened. Certain it is that the coal-hole was not made nor maintained for any such use as it was subjected to by Connor. If, then, it should be found that his employment was an independent one, and that he had no implied permission to use it in the manner in which he did use it, or if Connor was a trespasser while

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so using it, the plaintiff would not be liable for an injury sustained by the defendant, on the instant that Connor ceased to use it. While it is true, as the learned judge said, "the instant that he ceased to use it, its control reverted to the" plaintiffs in error; yet it does not follow "from that instant they were bound to protect it." This is imposing too harsh terms on them. If they had no expectation that the hole would be uncovered or thus used, and no knowledge that it was, they should not be held liable until such reasonable time had elapsed, under all the circumstances, that a careful and prudent man ought to have discovered its dangerous condition. If, after such reasonable time had elapsed, and they failed to make the hole secure, they cannot be relieved from the consequence of their own negligence, by showing the previous trespass of Connor. It then follows that the assignments, except the last, are substantially sustained.

Judgment reversed and a *venire facias de novo* awarded.

Judgment reversed.

NOTE BY THE REPORTER.—The following English cases involve the doctrine of the principal case :

Dean v. Brathwaite, 5 Esp. 85, A. D. 1808. The owner of horses and chaise let out for hire, and not the hirer, is liable for injuries done by them. *Per ELLENBOROUGH, J.*

Sammell v. Wright, 5 Esp. 263, A. D. 1805. The Marchioness of Bath hired servants and horses for her coach. The owner of the horses was held liable for injury. Same judge.

Leslie v. Pounds, 4 Taunt. 649, A. D. 1812. The entrance to a cellar in the highway was left uncovered at night, while undergoing repairs for the owner. He was held liable for injury to one who fell in. *Per MANSFIELD, C. J.*

Matthews v. West London Water Co., 3 Campb. 403, A. D. 1813. Defendants held liable for negligent construction of a sewer by a contractor, because "they caused their contractor to commit a public nuisance." *Per Ld. ABINGER.* "This case is not considered authority." *Overton v. Freeman*, 11 C. B. 872, A. D. 1832.

Laughlin v. Pointer, 5 B. & C. 547, A. D. 1826. Defendant held not liable for injuries committed by driver of horses owned by another and furnished for defendant's carriage. *Per Ld. TENNYDEN.* Here originated as *dictum* the untenable distinction as to liability between the owners of real and those of personal property.

Smith v. Lawrence, 3 Mann. & Ryl. 1, A. D. 1828. Owner of carriage hired post horses and postillions of B, a livery-stable keeper. The negligence of the postillions injured C's carriage. B was held liable.

Fenton v. City Dublin Packet Co., 8 A. & E. 835, A. D. 1838. Defendants owned a vessel and hired her crew, and leased her to D. Vessel sunk plaintiff's boat. Defendants and not D held liable.

Quarman v. Barnett, 6 M. & W. 469, A. D. 1840. Exactly like last case, except that defendant paid the driver. Same holding.

Milligan v. Wedge, 13 A. & E. 737, A. D. 1840. Owner of ox not liable for injury by it while driven by servant of a licensed drover.

Rapson v. Cubitt, 9 M. & W. 710, A. D. 1842. Defendant contracted to alter a building, and sub-contracted with B for gas fittings. Through negligence of B's servants plaintiff was injured by explosion. Defendant held not liable.

Allen v. Hayward, 7 A. & E. 960, A. D. 1845. Commissioners contracted the building of a drain, the contractor to pay wages and damages. The contractor did the work so defectively that it broke, and injured plaintiff. Commissioners held not liable.

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Reedie v. London & N. W. R. Co.; Hobbitt v. Same, 4 Ex. 344, A. D. 1849. Defendants contracted for work, in the course of which a stone fell and injured plaintiff. Defendant had reserved the right to dismiss the contractor's servants for incompetence. *Held*, not liable. This case explodes the distinction between real and personal property.

Knight v. Fox, 5 Ex. 721, A. D. 1860. A railroad company contracted with A to build part of a railroad; A contracted with defendant to build a bridge on it; defendant contracted with C, his own servant, to build a scaffold for it. Plaintiff was hurt by C's negligence. Defendant held not liable.

Overton v. Freeman, 11 C. B. 867, A. D. 1853. Contractor to pave a street not liable for injury caused by stone left in the street by a sub-contractor, although claimed to be a public nuisance.

Ellis v. Sheffield Gas Co., 2 Q. B. (E. & B.) 767, A. D. 1853. Defendant held liable for an unlawful act by contractor.

Dalryell v. Tyrer, K. B. & E. 809, A. D. 1858. H., a ferry lessee, agreed to carry plaintiff across for a year. He hired a boat for one day of defendant, defendant hired the crew, H. received the fares and paid defendant. Plaintiff was injured by negligence of defendant's workmen. Defendant and not H. held liable.

The Mobile, 1 Swa. Adm. 127, A. D. 1856. Owner of vessel not liable for accident if pilot has exclusive charge.

Pickard v. Smith, 10 C. B. (N. S.) 470, 480, A. D. 1860. Defendant hired of a railway company a saloon and coal cellar, the latter having openings on the railway platform. A coal company's servants put in coal, and left the opening unguarded, whereby plaintiff was injured. Defendant held liable. The expression of WILLIAMS, J., that the coal company would not be liable, was pronounced *obiter*, and the contrary decided in *Whitely v. Pepper*, 2 Q. B. Div. 278; s. c., 30 Eng. Rep. (Moak's Notes) 311.

Hole v. Railway Co., 6 H. & N. 497, A. D. 1861. Defendants were authorized by law to construct a drawbridge and liable for any detention to vessels. They contracted the work. The bridge had a broken wheel. Defendant held liable, because the negligence was not collateral.

Buller v. Hunter, 7 H. & N. 823, A. D. 1862. Defendant employed an architect to superintend repairs, and contracted the work. In the course of it his negligence caused the fall of plaintiff's wall. Defendant held not liable. The court said: "Where the mischief arises not from the act itself, but from the improper mode in which it is done, the person who ordered it is not responsible unless the relation of master and servant exists."

Mersey Docks v. Gibbs, L. R., 1 H. of L. 93, 114, A. D. 1864. Approves *dictum* in *Pickard v. Smith*, "If contractor is employed for lawful purpose, and accident happens casually in course of work, owner not liable."

Murphy v. Caralt, 3 Hurst. & Colt. 482, A. D. 1864. Defendant's servants negligently piled his cotton bales in another's warehouse under the warehouseman's direction. Defendant held not liable for an injury therefrom.

Murray v. Currie, L. R., 6 C. P. 24, A. D. 1870. Defendant hired stevedore to unload. He employed defendants' servants and machinery. Plaintiff was injured by a cog-wheel. Defendant held not liable.

Goslin v. Agricultural Hall Co., 1 C. P. D. 483, A. D. 1876. A club hired defendant's hall, defendant to receive, care for, and deliver stock. Defendant contracted this to S. An exhibitor sent an order to defendant to deliver stock. It being lost, defendant held not liable.

McLean v. Russell, 12 D. 887; 3 Ross' L. C. C. 261. A, an owner of real estate, contracted with B for repairs. B sub-contracted with C, whose servants left a lime heap in the street, over which a cabman drove and was killed thereby. In an action against A, B and C, the latter alone was held liable.

Bush v. Steinman, 1 B. & P. 404, holding the contrary doctrine, overruled, *Reedie v. London, etc.*, L. R., 4 Ex. 344; *Overton v. Freeman*, 11 C. B. 861; rejected *Blake v. Ferris*, 5 N. Y. 48; *Stevens v. Armstrong*, 6 id. 435; *Hullard v. Richardson*, 3 Gray, 349.

The following are the main American cases: *Blake v. Ferris*, 5 N. Y. 48, A. D. 1851. Defendant had license to excavate a highway, contracted for the work, and the contractor left the excavation unfenced, whereby plaintiff suffered injury. Defendant held not liable. "There cannot be two superiors severally liable in such a case."

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Stevens v. Armstrong, 6 N. Y. 435, A. D. 1852. A sold a box of goods to P. P.'s porter, with A's knowledge, came to get it and used A's tackle. Through negligence the box fell and hurt plaintiff. A held not liable. Approved in *Hilliard v. Richardson*, *supra*.

DeForest v. Wright, 2 Mich. 368, A. D. 1852. A public licensed drayman, employed by defendant to haul salt, rolled a barrel against plaintiff. Defendant held not liable.

Hilliard v. Richardson, 69 Mass. (3 Gray) 349, A. D. 1855. Owner of land having contracted for erection of building, not liable for injury from deposit of plank in the highway by contractor's servant.

Congreve v. Smith, 18 N. Y. 79, A. D. 1858. One who makes or continues an excavation in a highway, without authority, is liable for injury resulting therefrom by the negligence of the contractor doing the work.

Creed v. Hartman, 29 N. Y. 591, A. D. 1864. Defendant, not being authorized to excavate the highway, employed a contractor to do so. Defendant held liable for injury therefrom.

Water Co. v. Ware, 16 Wall. 566, A. D. 1873. Plaintiff was injured by falling into a ditch dug to lay pipes in a street in St. Paul. The company had contracted with the city to be liable. The work was done under seven sub-contracts. Held, that where the work was a nuisance, principal was liable, and not otherwise, and distinguished between direct and collateral injuries.

McCafferty v. Spuyten Duyvil, etc., R. R. Co., 61 N. Y. 178, A. D. 1874. Defendant not liable for negligent blasting by contractor. See, also, *King v. N. Y. Cent., etc., R. R. Co.*, 66 N. Y. 181; s. c., 28 Am. Rep. 37, A. D. 1876.

See, also, *Earle v. Hall*, 43 Mass. (3 Mete.) 353, A. D. 1841; *Painter v. Mayor*, 46 Penn. St. 321, A. D. 1868; *Allen v. Willard*, 57 id. 374, A. D. 1868; *Homan v. Stanley*, 66 id. 464; s. c., 5 Am. Rep. 369, A. D. 1871.

Clapp v. Kemp, 129 Mass. 481, A. D. 1877. Cases in its circumstances like *Pickard v. Smith*, *supra*. The jury were charged "that the defendants, if they were occupants of the store, would not be liable for the negligence or carelessness of the teamster, if, as the servant of A, who furnished the coal, he had the exclusive possession or control of the premises so far as was necessary to enable him to deliver the coal. But if the jury are satisfied that the defendants were at the time the occupants of the store, and as such occupants had the right to direct or control the mode or manner of said delivery, then the teamster would be the servant of the defendants, so as to render them liable for injuries occasioned by his negligence or carelessness in the delivery of the coal." The plaintiff had a verdict. Held, that the defendants had no ground of exception.

For the rule as to municipal corporations, see *City of Erie v. Caultkins*, *ante*, p. 642, and note, p. 647.

In accord with these cases is the rule that the landlord is not liable for injuries produced by the negligence of the tenant. *Robbins v. Jones*, 15 C. B. (N. S.) 221; *Corey v. Mann*, 14 How. Pr. 163; *Chatham v. Hampton*, 7 Eng. C. L. R. 186; *Glancy v. Byrne*, 56 N. Y. 129. In the last case it is held that a covenant by a landlord to repair does not inure to the benefit of a stranger. But both landlord and tenant are liable for an unauthorized excavation in the highway. *Irvine v. Wood*, 51 N. Y. 224. In *Davenport v. Ruckman*, 37 N. Y. 566, 574, the landlord had allowed the cellar-way to become dangerous, and had subsequently let the premises, agreeing to repair. Held, that he was liable to an injury from such want of repair.

Gould v. McKenna.

GOULD v. MCKENNA.

(86 Penn. St. 297.)

Negligence — eaves-drip — contributory negligence.

The defendant so constructed and maintained the roof of his building, that the water flowed therefrom upon the wall of plaintiff's adjoining building, and penetrating it, damaged his goods. *Held*, that the fact that the defendant's wall was so openly and loosely constructed as easily to admit the water, was no defense to an action for such damages.

ACTION for negligence. The parties were occupants and owners of adjoining lots and buildings. The defendant extended his building in the rear, using the plaintiff's party-wall, and pitching his roof toward that wall, furnishing it with a discharge pipe, and with an apron about one foot high, against that wall, to ward off the water. There was no escape provided for the water from his roof except through that pipe. A heavy rain storm raised the water above the apron, and it leaked through the wall, injuring the plaintiff's goods. The defendant contended that the water entered on account of the openness and looseness of the wall. Plaintiff had judgment.

John C. Grady and E. Spencer Miller, for plaintiff in error.

P. Duffy and John O'Byrne, for defendant in error.

AGNEW, C. J. As a whole, there was no error in the charge and answers to points. The instruction substantially was, that the defendant was liable for any insufficiency of the apron or flushing raised along the plaintiff's wall to carry off the water sent down against it by the defendant's roof. Having pitched his roof so as to carry the rain-fall against and into the wall, it was his duty to raise the apron or flushing so high as effectually to protect the plaintiff's store from being flooded by the water thus brought down. He had no right to carry the rain-fall on his premises into and upon the premises of the plaintiff. This was a wrongful act, which he could not justify by averring the openness of the wall of the plaintiff. But for the rain coming through the top of the wall, and not from the defendant's roof, he was not answerable.

Any loss from that cause belonged to the plaintiff. Nor was the defendant liable for the flowage of an extraordinary rain, such as no experience or prudent forethought could have expected or guarded against, provided he had erected a sufficient apron or barrier against such as might be expected. *Railroad Co. v. Gilleland*, 6 P. F. Smith, 445.

Coming to the question of contributory negligence, it is equally plain that the openness of the wall above the apron had nothing to do with the defendant's illegal act in casting the flowage of his roof against and into the wall. The wall was there before, and when the defendant pitched his roof against it his duty required him to protect the plaintiff against an act wholly his own. If the apron or barrier were insufficient to prevent the flow of the water through the wall into the plaintiff's store, the injury was one for which the defendant was alone responsible. It is true, the openness of the wall above an insufficient apron would increase the damage done to the goods in the store, but it did not cause the roof to be built or the pitch to be given to it, which threw the rain-fall from the roof into the wall, and did not, therefore, contribute to the act which produced the injury. But for the water falling through the wall above, and not brought down by the defendant's roof, the plaintiff alone was answerable, for the defendant had no part in causing it to flow there. Each cause of injury was independent of the other. Hence the instruction was proper to allow no damages for the water running into the store through the wall above, provided the apron or flushing was sufficient. True, it is difficult to apportion the damages arising from the insufficiency of the apron; but this cannot exempt the defendant from a positive injury done by casting the flowage of his roof into his neighbor's store. The rain-fall through the wall above a sufficient apron or barrier did not contribute to produce this injury, though it did add to the damage sustained by the plaintiff's goods. Hence it was the duty of the jury to apportion the loss according to the actual injury of the defendant, by separating it, as well as they could upon the evidence, from the loss arising from the openness of the wall above a sufficient apron. The evidence is a matter for the parties to consider and to produce. The contributory negligence, which prevents recovery for an injury, is that which co-operates in causing the injury—some act or omission concurring with the act or omission of the other party to produce the injury

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(not the loss merely), and without which injury would not have happened. A negligence which has no operation in causing the injury, but which merely adds to the damage resulting, is no bar to the action, though it will detract from the damages as a whole. Now, it is clear the open wall of the plaintiff bore no part in causing defendant to build his roof and give it the pitch against the wall. The building of the roof and its pitch were the sole act of the defendant, and caused the injury to the extent of the flow of water from the roof. It was against this he was bound to protect the plaintiff. The difficulty of separating the damage from each independent cause may be great, but it does not change the nature of the tortious act of the defendant or relieve him from liability. *Little Schuylkill Nav. Co. v. Richards' Adm'r*, 7 P. F. Smith, 146-7; *Seely v. Alden*, 11 id. 302. The qualifications complained of in the answers to the points were necessary to keep before the minds of the jurors the liability of the defendant for the insufficiency of the apron or barrier put up by him along the wall.

Upon the whole, we discover no error to correct.

Judgment affirmed.

 URICH'S APPEAL.

(36 Penn. St. 386.)

Will — construction — "heirs" — limitation by subsequent clause.

A testator devised lands to his children and their "heirs," by separate clauses. By a subsequent clause, he declared that none of the children should have a right to sell or incumber the lands, but "the lands shall remain free for their children or heirs, and they, my said children, shall have the use, income and profit of the said lands and farms during their life-time." By a still later clause, he gave them the power to dispose of their interests "by will as aforesaid." *Held*, that the testator's children took but life-estates.

PETITION to be made parties to proceedings for partition.

The petition was filed by Matilda Ulrich, claiming dower as widow of John Stoudt, in lands devised to him by his father, Jacob. An early provision of the will gave a farm to John "and to his heirs." The other provisions are sufficiently set out in the opinion. The petition was dismissed on the ground that John took but a life estate.

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George W. Biddle, Josiah Funck and H. Van Reed, for appellants. Devising the fee, the conditions in restraint of alienation were void. *Reifenyder v. Hunter*, 7 Harris, 41; *Walker v. Vincent*, id. 369; *McOullough's Heirs v. Gilmore*, 1 Jones, 870; *Jauratche v. Proctor*, 12 Wright, 471; *Doebler's Appeal*, 14 P. F. Smith, 9. The right to dispose of the estate by will carries the fee. *Girard Life Ins. and Trust Co. v. Chambers*, 10 Wright, 490; *Anderson v. Jackson*, 16 Johns. 388. If it was the intention that the owners should take an estate for life with remainder over to "children as heirs," then "children" is equivalent to "heirs," and the rule in *Shelley's case* will apply. *Kepple's Appeal*, 3 P. F. Smith, 211; *Physick's Appeal*, 14 Wright, 128; *Nice's Appeal*, id. 148; *Dodson v. Ball*, 10 P. F. Smith, 497.

Amos B. Wanner and W. H. Livingood, for appellees.

AGNEW, C. J. The will of Jacob Stoudt is brought before us a second time, in the hope of changing our opinion upon it. That opinion, though expressed in a short *per curiam*, to be found in 2 W. N. C. 550, was maturely formed. Its brevity is not evidence of want of examination, but of the necessity of condensation where there is so much to do. The able arguments of the counsel for the appellants have not changed our deliberate interpretation of the devise to John Stoudt. We agree with all said upon the first expression of this devise, if the testator intended to give him a fee, and used the word "heirs" in its legal acceptation. But that intention is the pivot of the question and must be carefully gathered from all parts of the will.

The first point of notice is, that, on its face, it appears that the will was not written by a learned lawyer, or a skillful conveyancer. Hence the language is not so conclusive of intent. The next matter is the evident intent of the testator to equalize his children in a general way; and the portion of John, the only son, is much larger than those of his sisters. John takes his "large farm" of three hundred acres, the grain seeded out, and all farming stock and utensils; Catharine, two parcels containing two hundred and twenty-five acres, and pays thereout \$4,300 to her sisters, Sarah, Polly and Harriet, and they take smaller farms; Sarah one hundred and thirty-seven acres, Polly one hundred and ten acres and Harriet one hundred and eighteen acres. All the personal estate is then

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divided equally among the five children, John, Catharine, Sarah, Polly and Harriet, excepting additional to Polly and Sarah, \$909 and \$1,000. It is thus evident that the charge of \$4,300 against Catharine's land was to produce equality of division, the children of Catharine taking the advantage of the increased size of her farm.

With this exhibition of general intent we come to the special intent of the testator, as to the quantity of estate limited to his children. It is brought out clearly in the fourth and second items from the end of the will. The fourth is in these words: "I herewith make known and declare it as my will that none of my aforesaid children shall have a right to sell or assign their land or property to them bequeathed as aforesaid; neither shall they have a right to incumber it with debts or liens, but the lands shall remain free for their children or heirs, and they, my said children, shall have the use, income and profit of the said lands and farms during their life-time."

Now if we treat the word "heirs" in the principal devise to John Stoudt, as conclusively descriptive of the quantity of his estate, the entire item first quoted is clearly repugnant and nugatory. But we cannot do this if, by any proper interpretation, the items can be reconciled. To hold to the legal and technical meaning of the word "heirs," we must assume that the testator was grossly ignorant of his own intent, and of the law also, when he came to the quoted item. If this item contained the first two clauses only, perhaps we might reach this result, for then we should have only a technical term interpreted by the law (*Criswell's Appeal*, 5 Wright, 288), and a mere attempt to clog the fee with illegal conditions. But when we reach the last two clauses in the same item, equally parts of the same thought and expressed *uno flatu*, we perceive we cannot do this without violating a clear intent of the testator fully and distinctly expressed. Thus he says, without break in the sentence, "But the lands shall remain free for their children or heirs." Here we have the clue to the prohibition against alienation and incumbrance. Why shall they not alien or incumber? Because, says the testator, my will is, the estate shall remain free (unaffected by these acts) for their children. It is argued this purpose is defective, for *grandchildren* would not take if a parent died before the testator. This is against a settled rule that "children" will include grandchildren where it is necessary to serve the intent

of the testator. *Dickinson v. Lee*, 4 Watts, 82; *Pemberton v. Parke*, 5 Binn. 601. Various readings of the word "children" will be seen in the citations in *Yarnall's Appeal*, 20 P. F. Smith, 341.

This clause further interprets the word "heirs." Here "children," the primary word, precedes "heirs," the secondary, and the latter, as the alternative of the former, expresses the testator's own thought. Yet this clause standing alone might still leave the intention liable to some contest. But it is followed by another part of the same united sentence, leaving the intent free of all doubt. Thus—"and they, my said children, shall have the *use, income and profit* of the said lands and farms during their *life-time*." Here we have two express declarations of intent: 1. The subject of the children's devise is clearly defined—the precise interest of a life-tenant by the use, income and profits of the lands. Thus the usufructuary interest alone is given, and this is all a life-tenant can take. Not content with defining the subject, he becomes finally and fully explicit, and expressly defines the term or duration of the estate itself, viz.: "during their life-time." Now the full meaning and intent of the testator is fully developed and clearly expressed. His own children shall have the use, income and profits of the lands devised for life only, without power to alien or incumber, in order that these lands shall remain after their death for their children.

Then follows the item next to the last, which confers a power to dispose by will. Here comes in another thought of the testator, perfectly natural and obvious. Remembering that one daughter is unmarried, and that some of his married children may die without leaving children, or that their children may differ in merits or be unequally provided for, and that he has just prohibited his devisees from enjoying more than a life-estate, he thinks of these contingencies, and now gives a power of appointment by will; and to express this intent more distinctly, says, "to take effect after their decease." This is the crowning sheaf of his intention, and shows that he did not intend to give a fee-simple when he used the word "heirs" in the principal devise, as his own alternative expression for "children," or possibly with a vague conjecture of its meaning. If he used it in a general way, it is plain he clearly defined and restricted it, in the clause we have been considering, and the rule is that between repugnant clauses in a will the last shall govern.

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Our former decision must, therefore, stand, with these further reasons for it.

Decree of the Orphans' Court dismissing the petition affirmed, with costs to be paid by the appellants, and their appeal is dismissed.

Appeal dismissed.

SANDERSON V. THE PENNSYLVANIA COAL COMPANY.

(86 Penn. St. 401.)

Nuisance — corruption of water-course.

The plaintiff purchased a tract of land in the coal region, and erected a residence upon it. A leading inducement to the purchase was a pure mountain stream of water running through the land. The plaintiff constructed a pond for fish and ice upon it, and from it supplied a cistern, a ram, and a tank in the attic of his house. Subsequently defendants opened a colliery on the stream two miles above, which corrupted the water and spoiled it for plaintiff's uses, killed fish and shrubbery, corroded the pipes and compelled plaintiff's abandonment of the water. *Held*, that plaintiff had a right of action therefor, and that a nonsuit was error.*

TRESPASS. The opinion states the facts. Plaintiff was nonsuited.

A. Ricketts, for plaintiff in error.

Henry M. Hoyt and *Andrew T. McClintock*, for defendant in error. The rightful use of one's land may cause damage to another without any legal wrong. *Haldeman v. Bruckhart*, 9 Wright, 514; *Wheatley v. Baugh*, 1 Casey, 528; *Wilson v. Waddell*, L. R., 2 App. Cas. 95; *Snow v. Persons*, 28 Vt. 459; *Chatfield v. Wilson*, id. 49; *South Royalton Bank v. Suffolk Bank*, 27 id. 505; *Mahan v. Brown*, 13 Wend. 261; *B. R. & A. Water and Mining Co. v. N. Y. Mining Co.*, 3 Cal. 327; *Broadbent v. Ramsbotham*, 11 Ex. 602; *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 2 Hurl. & Norm. 168; *Greenleaf v. Francis*, 18 Pick. 117; *New River Co.*

* See *Jacobs v. Allard* (43 Vt. 305), 1 Am. Rep. 331; *Richmond Mf. Co. v. Allaupe De Latine Co.* (10 R. I. 106), 14 Am. Rep. 638; *Washburn v. Gilman* (54 Me. 183), 18 Am. Rep. 246. As to nuisance by brick burning, see *Huckinstine's Appeal* (70 Penn. St. 103), 10 Am. Rep. 639; *Campbell v. Seaman* (63 N. Y. 569), 20 Am. Rep. 567, and note, 580; by jarring of machinery, *McKeon v. See* (51 N. Y. 300), 10 Am. Rep. 659; by cooking range, *Grady v. Wolner* (46 Ala. 351), 7 Am. Rep. 593.

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v. *Johnson*, 2 E. & E. 435; *Kauffman v. Griesemer*, 2 Casey, 407; *Martin v. Riddle*, id. 415.

WOODWARD, J. In the year 1868 the plaintiffs purchased a tract of land in the city of Scranton, and began the erection of a house upon it, which was finished in the year 1870. Before the purchase, a stream of water, which ran through the land, was examined by Mr. Sanderson, who traced it to its source. It appears from his testimony that the existence of the stream was a leading inducement to the plaintiffs to buy and build. It was called by some of the witnesses Meadow brook, and was of an average width of perhaps seven feet throughout the distance from the house of the plaintiffs to the springs from which it flowed. Mr. Sanderson testified that when he traced it in 1868 the water was perfectly pure. Dams were built across it for the purposes of a fish and ice pond, and to supply a cistern. Water was carried in pipes from the cistern to a ram, and thence to a tank in the attic of the house.

After the improvements were completed the defendants established a colliery on lands belonging to them along the stream, and about two miles above the land of the plaintiff. A drift was first made into their mine, and a shaft was afterward sunk. The water which collected in the drift, as well as that pumped by powerful engines from the shaft, ran into Meadow brook, and was carried to its outlet in the Lackawanna river. It was alleged on the trial that the effect of the mine-water was to corrupt the water of the stream, and to render it worse than worthless for any domestic or household use. There was evidence that the fish in the brook were destroyed; that the willows along the banks died; that the pipes connecting it with the cistern, the ram and the house, were corroded and eaten out; that the water became unfit for domestic uses as early as 1873, and that its use for all purposes was abandoned in 1875. After the evidence of the plaintiffs had been given, it was held by the court to be inadequate to warrant or support a verdict, and a nonsuit was directed.

In the summary disposition that was made of the cause, sight appears to have been lost of some distinctions which the law has settled, and a mistake seems to have been made in choosing the class of precedents that were followed. The water in the mine of the defendants was in the ground before the colliery existed, but the drift and shaft collected it in such volume, and the mining

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operations made its ejection necessary in such a direction as to render what was harmless in its natural state a source of material discomfort, mischief and disaster. Undoubtedly the defendants were engaged in a perfectly lawful business, in which large expenditures had been made, and with which wide-spread interests were connected. But however laudable an industry may be, its managers are still subject to the rule that their property cannot be so used as to inflict injury on the property of their neighbors. "Every man," Lord TRAUBER observed, in *Egerton v. Earl Brownlow*, 4 H. L. C. 195, "is restricted against using his property to the prejudice of others." The invasion of an established right will, in general, *per se*, constitute an injury for which damages are recoverable, for in all civil acts the intent of the actor is less regarded than the consequences to the party suffering. Thus, if a man lop a tree, and the boughs, *ipso invito*, fall upon another, or he shoot at a butt, and hit another unawares, an action lies. So, one is liable who has land through which a river runs to turn his neighbor's mill, and lops the trees growing on the river side, and the loppings impede the progress of the stream, which hinders the mill from working. Broom's Leg. Max. 366, 367. To render a particular case an exception to the general principles controlling the exercise of dominion over property by its proprietor, it must be ascertained to be exceptional in its surroundings or its facts. From necessity the principles are sometimes relaxed. They do not apply where it is impossible to gather safe facts to become bases for safe rules. With respect to water flowing in a subterraneous course, it has been held that the owner of land through which it flows has no right or interest which will enable him to maintain an action against an owner who, in carrying on mining operations in his own land, in the usual manner, drains away the water from the other's land, and lay his well dry. *Acton v. Blundell*, 12 M. & W. 324; *Haldeman v. Bruckhart*, 9 Wright, 514, and *Wheatley v. Baugh*, 1 Casey, 528, were ruled in the same way. So, rights and liabilities in respect of artificial streams, when first flowing on the surface, are in some particulars distinct from those respecting natural streams so flowing. They are distinct at least to the extent that the user of the easement of sending on the water of an artificial stream to the land of a neighbor, is no evidence that the land from which the water is sent has become subject to the servitude of being bound to send it on. *Gaved v. Martin*, 19 C. B. (N. S.) 732. Perhaps *Smith v.*

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Kenrick, 7 C. B. 515, may be classed as an exceptional case also in its circumstances, although as a precedent it will probably prove of doubtful value. It was held there that each of two owners of adjoining mines has a natural right to work his own mine in the manner most convenient and beneficial to himself although the natural consequence may be that some prejudice will accrue to the owner of the adjoining mine.

But except where it is qualified by the existence of peculiar conditions, the duty of the owner of property is defined by the maxim *sic utere tuo ut alienum non lœdas*. Can it be said, as a conclusion of law, that the duty of these defendants is qualified by such conditions? They created an artificial water-course from their mine to Meadow Brook. The plaintiff insisted that the act resulted in grave injury to them. Why ought not the jury to have been left to determine the truth or falsity of their allegation? It was declared in *Gaved v. Martin*, *supra*, that if the water in an artificial stream, when brought to the surface, is made to flow on the land of a neighbor without his consent, it is a wrong for which the party causing it so to flow is liable. If a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his own peril, and is liable for the consequences if it escapes and does injury to another. *Jones v. Festiniog*, L. R., 3 Q. B. 736. "The person whose grass or corn is eaten down by the escaping cattle of his neighbor; or whose mine is flooded by the water from his neighbor's reservoir (*Harrison v. Great Northern West Railway Co.*, 3 H. & C. 238), or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works (*St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642), is damnified without any fault of his own, and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it was confined to his own property, which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property." *Fletcher v. Rylands*, L. R., 1 Ex. 265. In an elaborate and carefully considered opinion in *Mason v. Hill*, 5 B. & A. 1, DENMAN, C. J., held that the possessor of land through which a natural stream runs, has the right to the advantage of that stream flowing in its natural course, not inconsistent with a simi-

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lar right in the proprietors of the land above and below ; and that neither can any proprietor above diminish the quantity or injure the quality of the water, nor can any proprietor below throw back the water without his license or grant. It was one of the features of that case that the water which the defendant had the right to use, subject to the duty of returning it, was heated when it was returned to the stream, and the jury had assessed damages for that. The chief justice said in entering judgment: "as to the right to recover for the injury sustained by the water being returned in a heated state, there can be no question." In *Wood v. Sutcliffe*, 16 Jur. 75, and 8 Eng. L. & Eq. 217, an injunction was granted to restrain the defendant, against whom a recovery had been had at law, from pouring dye-wares, dye-liquors, madder, indigo or potash into a channel that connected his dye-works with a stream called the "Bowling Beck," on which, below the works, the cotton-mill of the plaintiffs was situated, and in the use of the water of which they claimed prescriptive rights. "I am satisfied from the evidence," the vice-chancellor remarked, in the course of his opinion, "that to some considerable extent, the pollution of this stream is inevitable, and that no court of law, or court of equity, nor all the courts in the world, except there were a power of removing all that mass of human beings which now congregate about its banks, ever could restore it to the state in which it once was. But still it does not follow, because there be a certain degree of pollution, which cannot be very accurately measured, and which is inevitable, that therefore everybody has a right to pollute the stream by pouring in immense quantities of filth and pollution from his own works, to make it ten thousand times worse." *Pennington v. Brinsop Hall Coal Company*, 5 Ch. Div. 769, was a case where an injunction was granted to restrain the defendants from pumping water from their colliery into Borsdane Brook, by which the water in use for the cotton-mill of the plaintiffs had been corrupted. While their claim included the assertion of a prescriptive right it was discussed mainly in view of the position of plaintiffs as sub-riparian owners, by the justice who granted the injunction. In answer to the suggestion that in lieu of the remedy sought, damages should be awarded, it was said that "the rights of the plaintiffs as riparian owners are not limited to their present modes of enjoyment. It was impossible to foresee what modes they, or their successors in title, may resort to, or the extent of damages which would be compen-

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sation for the injury which the continued pollution might cause to such new modes of enjoyment." While a right by prescription was the main element of the title of the plaintiffs to a decree in *Wood v. Sutcliffe*, and a partial element in the title of the plaintiff in *Pennington v. Brinksope Hall Coal Company*, it did not enter at all into the consideration of *Mason v. Hill*. There, indeed, it was expressly put aside. "We do not wish," the chief justice declared, "to rest a judgment for the plaintiff on this narrow ground." *Pennington v. The Coal Company* was decided so lately as last May, and it would seem that in England this branch of the law has been definitely and firmly settled.

And the question is by no means a fresh one in Pennsylvania. In *Barclay v. The Commonwealth*, 1 Casey, 503, the defendant had been convicted of a nuisance in the Quarter Sessions of Bedford, in permitting the wash and waste from his barnyard to escape into the springs dedicated by the Penns to the use and benefit of the inhabitants of the town of Bedford. In this court, the judgment was reversed for an irregularity in the sentence, but the conviction was approved. *The Little Schuylkill Navigation Company*, 7 P. F. Smith, 142, was an action to recover damages for injury to the plaintiff's forge-dam in the Little Schuylkill river, caused by the throwing of coal dirt, slate and loose earths into the channel of the stream by the servants and employees of the defendants. The refuse matter was carried down the river by the action of the water, and deposited in the dam. Other persons were shown to have cast the refuse of their mines into the water, and the court below had charged in substance that the defendants were liable for the combined results of all the deposits. This instruction raised the main question on the writ of error. It was held here that the liability of the defendants began with their act on their own land, and was wholly separate and independent of concert with others; and that their tort, having been several when committed, did not become joint because its consequences united with the consequences of the acts of others. But it was not suggested that under any theory or doctrine of public policy, the defendants had the right to use the river-bed as a dumping-ground for the rubbish of their mines. The corruption of the water was not alleged, it is true, but it is not readily apparent how a principle could be sound that would justify the destruction of the water of a running stream for one purpose,

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and not justify the destruction of its uses by the same or a similar agency for all purposes whatever.

In the argument here, the ground was distinctly taken that immense public and private interests demand that the right, which the defendants exercised in ejecting the water from their mine, should have recognition and be established. It was said that in more than a thousand collieries in the anthracite regions of the State the mining of coal can only be carried on by pumping out the percolating water which accumulates in every tunnel, slope and shaft, and which, when brought to the surface, must find its way by a natural flow to some surface stream. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the Commonwealth, and that the production of an indispensable mineral, reaching to the annual extent of twenty millions of tons, should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine-water would naturally run. These are considerations that are entitled to be well weighed. In the trial of questions like this before a jury, they ought to be kept steadily in view. The proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints juries should be held with a steady hand. Only when some material and appreciable injury has been sustained should a recovery of damages against them be allowed. But there must be one rule of law maintained for all men, and by that rule all men's rights must be tried and tested. The view, so earnestly and ably presented by the counsel here, was pressed upon Mr. Justice MELLOR, in the trial of *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642, a precedent in every way of interest and value. After the verdict a motion for a new trial was heard and refused by the Court of Queen's Bench, and on review in the Exchequer Chamber, and afterward in the House of Lords the judgment was affirmed. In charging the jury the judge used this language: "The defendants say, 'If you do not mind, you will stop the progress of works of this kind.' I agree that that is so, because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on—works which are the means of developing the national wealth—you must not stand on extreme rights, and allow a person to say, 'I will bring an action

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against you for this, that, and so on.' Business could not go on if that were so. Every thing must be looked at from a reasonable point of view; therefore, the law does not regard trifling and small inconveniences, but only regards essential inconveniences; injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected." In another part of the same lucid charge the jury were instructed that "if a man by any act, either by the erection of a lime kiln, or copper works, or any work of that description, sends over his neighbor's land that which is noxious and hurtful, to an extent which sensibly diminishes the comfort and value of the property, and the comfort of existence on that property, that is an actionable injury." The consequences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time when, under the operations of even a single colliery, a whole country side would be depopulated.

PAXSON, J., dissented.

Judgment reversed and procedendo awarded.

CENTRAL RAILROAD OF NEW JERSEY V. GREEN.

(86 Penn. St. 437.)

Statutory construction — penalty — satisfaction.

A statute imposed a penalty on any railroad company which should exclude any person or persons from any particular car on account of race or color, and subjected the employees offending to fine and imprisonment. A man and his wife, colored persons, were excluded from a car by the same employee at the same time. *Held*, but a single offense, and that a recovery by the man and his wife in right of the wife barred a recovery in his own right. (*See note, p. 722.*)

DEBT for a penalty. The opinion states the facts. Plaintiff had judgment.

Stanley Woodward, for plaintiff in error.

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Wm. H. McCartney, for defendant in error.

PAXSON, J. The plaintiff below brought an action of debt to recover the penalty of \$500 under the first section of the act of 22d March, 1867, Pamph. L. 38, for excluding him from a particular car of the defendant corporation. It was alleged by the plaintiff that himself and wife were prevented from entering one of the passenger cars of the defendant, at Wilkesbarre, on the 26th of December, 1873, by one of the employees of the company, and compelled to take another passenger car of the same train in order to proceed to their home, a distance of two miles. There was neither allegation nor proof that the car they were compelled to enter was inferior in any respect to the one from which they were excluded, nor that it was a car set apart for colored people. It was contended, however, that they were not allowed to enter the particular car by reason of their color, and the jury have established this fact by their verdict. The case comes up to us upon the single question whether a former verdict and judgment in a suit brought by the plaintiff and his wife in right of the wife, for the same act of exclusion, is a bar to this suit. The court below held that the former recovery was not a bar, upon the principle that the act of the company's employee in refusing to allow the plaintiff and his wife to enter a particular car was in the nature of a tort, and that either or both could recover for an injury resulting therefrom.

If this were an action to recover damages resulting from personal injuries, occasioned by the act of the company's servant, the reasoning of the learned judge would not be inaccurate. In such case a verdict in favor of the wife for injuries sustained by her, would be no answer to a suit by the husband for injuries sustained by him. It was not an action for damages at all. It is not even contended that any damages were sustained. The action is for the penalty imposed by the legislature upon railroad companies, who should compel colored people to ride in a particular car. The object of the act was to punish such corporations for making such distinction. The exclusion of the plaintiff and his wife was a single act, done at the same time and by the same person. To punish the company twice for the same act would be unreasonable, and against the spirit and meaning of the act of assembly. This is plain from an examination of the second section, which provides: "That any agent, conductor or employee of any railroad or railway

corporation within the Commonwealth, who shall exclude, allow to be excluded, or assist in the exclusion from any of their cars set apart for the accommodation of passengers, any person or persons, on account of color or race, or who shall refuse to carry such person or persons on account of color or race, or who shall throw any car or cars from the track, thereby preventing persons from riding, shall be deemed guilty of a misdemeanor," etc. Thus we have two sections relating to this subject, the first imposing a penalty of \$500 upon any company which shall exclude any person or persons by reason of color or race from any particular car, or which shall allow it to be done by any agent, conductor or employee, and the second punishing by fine and imprisonment any agent, conductor or employee who shall be guilty of such act. It certainly could not be seriously contended that the employee by whom the plaintiff and his wife were excluded could be twice prosecuted and convicted under the second section. It was a single act, and when once punished according to law he could not be punished again. So under the first section, the company, after having once paid the penalty for their unlawful act, cannot be called upon to pay it again. And this because the penalty is given by way of punishment to the offender, rather than by way of compensation to the party aggrieved. For any injury he may have sustained he would have his right of action independent of the penalty, and I do not see that he would be bound thereby. The fact that several persons may be aggrieved by the commission of a single offense affords no ground to justify an inference that each may have his suit for the penalty imposed upon its commission, where the plain object of the law is to punish or repress a public wrong rather than to compensate a private injury. The penalty imposed by the act is so disproportioned to any supposable injury in any ordinary case that we are bound to presume it was intended as a police regulation for the management of railroads, and to have been induced from motives of public policy. Indeed this clearly appears from the title of said act, which describes it as "an act making it an offense for railroad corporations within this Commonwealth to make any distinction with their passengers on account of race or color, and punishing said corporations, and their agents and employees, for the commission of such offense." We cannot give a loose construction to an act so severely penal as this. Had the legislature intended to give an action to each person aggrieved by a single act of an em-

ployee of the company, it would probably have used appropriate language to express such intent, and said any, or each, or every person aggrieved, shall have his, her or their action, etc. On the contrary, we have an offense defined, which, by the terms of the act, may be committed against one or several persons, and an action of debt for the penalty given, to "the *person* thereby injured or aggrieved." Again, the statute gives but \$500 for the exclusion of any person or persons from the car. How then can it be possible for a single act to recover a double penalty? I do not think it necessary in so plain a case to incumber this opinion with any extended citation of authority, especially in view of the fact that it must be decided to a great extent upon the proper meaning and construction of the act of assembly. Yet the case of *Hill v. Williams*, 14 S. & R. 287, is so like this in principle that a brief reference to it may not be unprofitable. There the action was against a justice of the peace to recover the penalty of fifty pounds under the act of 14th of February 1729-30 (1 Sm. Laws, 180), to prevent clandestine marriages. Both of the parties joined in marriage by the justice were minors. The father of the female infant brought his action under the statute and recovered. Subsequently the father of the male infant brought a similar suit against the justice, and it was held that but one penalty could be recovered, and that the first judgment was a bar to the second suit. It was said by TILGHMAN, C. J., in delivering the opinion of the court: "The object of the law was not so much to make a compensation to the injured parents (for in many cases fifty pounds would be no compensation), as to deter all persons from being accessory to these clandestine marriages. For this purpose a certain penalty was thought to be the best remedy, and a penalty in money being inflicted, no person was so proper to receive it as the party grieved, if he thought it advisable to sue for it. But, if he declined suing for the penalty, I see nothing to hinder him from suing for damages under the original act. Penal laws should be held to a strict construction, and it would certainly require very clear expressions to double the penalty. The argument in favor of a double penalty is founded on the expressions in the second section, "he shall forfeit the sum of fifty pounds, to be recovered by the person or persons grieved." But what is to be recovered? The sum of fifty pounds and no more, for no other sum is mentioned. The word "persons" is often applicable to one party. For instance, a minor

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may have several guardians or several masters who are in partnership. In such cases all the guardians or both the masters may bring suit as one party. But if the word "persons" is applied to a case like the present, where the parents of both man and woman are grieved by the marriage, it is much more reasonable to say that both may join in the action and share the penalty, than that the justice shall pay one hundred pounds, when the law has said that he shall pay fifty pounds." The inclination of the courts against multiplying penalties is strong. *Commonwealth v. Borden*, 11 P. F. Smith, 272; *Hardyman v. Whitaker*, 2 East, 573; *The King v. Bleasdale*, 4 Term Rep. 809; *Pike v. Madbury*, 12 N. H. 262; *Beadleston v. Sprague*, 6 Johns. 101. We need not pursue the subject further. We are of opinion that it was error to decline to affirm the first and second points of the defendants. Each of said points should have been affirmed without qualification.

Judgment reversed.

GORDON, J., dissented.

NOTE BY THE REPORTER. In *Sturges v. Spofford*, 45 N. Y. 446, it was held that a statute giving to commissioners of pilots a penalty of \$100 against any person employing an unlicensed pilot, authorizes the recovery of only one penalty against one person employing one such pilot, although he was employed on numerous ships. The court said: "It does not say for each employment, nor for each offense, nor for each ship unlawfully piloted. Penal statutes are to be construed strictly, and the language will justify the construction that but a single penalty is incurred for all of the alleged unlawful acts of the party prior to the commencement of the action. 'All persons employing' are liable, whether the unlicensed person employed piloted one or fifty ships. It is still but an employment. *Washburn v. McInroy*, 7 Johns. 184; *Tiffany v. Driggs*, 13 Id. 252. Prosecutions for aggregated penalties should not be encouraged. Penalties are often incurred inadvertently, or under a claim of right, and if the prosecution is promptly instituted for a single offense, it operates as a salutary warning to discontinue the practice, or acts complained of, while delay may be regarded as an acquiescence in the right of the party to perform the acts."

In *Fisher v. N. Y., etc., R. R. Co.*, 46 N. Y. 644, the statute providing that any railroad which should ask and receive a greater rate of fare than that allowed by law, should forfeit fifty dollars, etc. Held, that only one penalty could be recovered for all acts committed before the commencement of the action. This was based on the omission of the words "for each and every offense." The court regarded the penalty not as a satisfaction for the injury, but to enable the party to prosecute and recover costs, to indemnify him against expense, and to serve as an effectual warning. Counsel referred to *Devo v. Rood*, 3 Hill, 527, where by similar language a penalty was inflicted for violation of the excise act, but the court distinguished it on the ground that a subsequent section provided that the penalties might be recovered by the overseers of the poor, thus showing the design to impose a penalty and provide for its recovery for every offense.

In *Suydam v. Smith*, 52 N. Y. 383, the question was on the application of the words "for each offense," in the statute, and they were held to apply to and authorize successive offenses and recoveries.

Mathias v. Sellers.

MATHIAS V. SELLERS.

(36 Penn. St. 486.)

Lien for services — waiver — agreement on amount.

One with whom materials are left for manufacture has a lien on them for his work; such lien is not waived by a special agreement for the amount to be paid for the work; and replevin cannot be maintained for such manufactured materials until payment or tender of the charges.

REPLEVIN. The opinion states the facts. Plaintiff had judgment.

B. M. Boyer and J. Wright Apple, for plaintiff in error.

James Boyd, for defendant in error.

WOODWARD, J. In the fall of 1872, Sellers & Radey, the plaintiffs below, entered into an agreement with Mathias, the defendant, to furnish him with tobacco at prices that were specified. This tobacco was to be worked up by the defendant into cigars of such kinds and brands as the plaintiffs, from time to time, should designate. Fixed prices for the manufacture of the cigars, according to their quality, were to be allowed, and advances were to be made by the plaintiffs to the defendant for stamps and wages as the work should be done and the cigars be delivered.

On the 6th of November, 1873, the defendant had manufactured 90,000 cigars, which were in his possession. The stamps for them were procured and paid for by the plaintiffs, who alleged at the trial that an agreement was then made with the defendant by which they were to take them away when stamped, and a full and final settlement was afterward to be made. Under this agreement the plaintiffs insisted that the right the defendant possessed to retain the cigars as security for the balance due for their manufacture had been waived. There was conflicting evidence on this branch of the case, the defendant denying the existence of the supplementary agreement. The question was one of fact for the jury, but it does not appear to have been submitted. As the court held that the defendant was not in any event entitled to a lien, it became unimportant to ascertain whether it had or had not been waived.

When the replevin issued, the balance of the account of the plaintiff against the defendant was \$2,585.40. This sum included \$450 paid for stamps on the 6th of November, 1873, and \$54.65 paid to the sheriff, apparently for expenses in the action. The value of the 90,000 cigars the defendant had made was shown by the testimony to be \$2,820. Including in the charges against him the \$54.65 paid to the sheriff, there was due to the defendant, therefore, the sum of \$234.60. Suit was brought without payment or tender of the amount, and the court charged at the trial that the existence of a balance, for work done in manufacturing the cigars, did not defeat the right of the plaintiff to maintain the action.

It has long been a settled rule of the common law, that goods deposited with a trademan or artisan for manufacture or repair, are subject for the work done on them to a specific lien. Thus, a tailor who has made a suit of garments out of the cloth delivered to him, is not bound to deliver the suit to his employer until he is paid for his services. Neither is a ship carpenter bound to restore the ship which he has repaired; nor a jeweller the gem which he has set, or the seal which he has engraved; nor an agistor the horse which he has taken on hire, until their respective compensations are paid. Story on Bailments, § 440, and the cases there cited. Though the right of lien probably originated in those cases in which there was an obligation, arising out of the public employment, to receive the goods, it is not now confined to that class of persons. A particular lien is given by the common law to any one who takes property in the way of his trade or occupation, to bestow labor and expense upon it. And it exists equally whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price. 2 Kent's Com. 635. It was said by HOLROYD, J., in *Crawshay v. Homfray*, 4 Barn. & Ald. 50, that the principle laid down in *Chase v. Westmore*, 5 Maule & Selw. 180, where all the cases came under the consideration of the court, was this, that a special agreement did not of itself destroy the right to retain; but that it did so only where it contained some special term inconsistent with that right. In 2 Selwyn's *Nisi Prius*, 540, the rule is stated to be, that the right of detaining a thing until the money due upon it be paid, may be waived by a special agreement as to the time or mode of payment; but not merely by an agreement for the payment of a fixed sum. The existence of the principle in its full reach has been recognized in Pennsylvania. *McIntyre v. Curver*, 2 W. & S. 392.

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was a replevin for thirty-four panel doors, which McIntyre had made from lumber delivered to him by Carver. The suit was brought without payment or tender of payment for the work McIntyre had done; but while it was pending, the money was offered and received. It was held that the tender and acceptance came too late to help the plaintiff. "The suit was brought," Chief Justice GIBSON said, in entering the judgment, "before the right of action was complete, and such a defect cannot be cured by any subsequent act, except a binding agreement not to take advantage of it." In *Pierce v. Sweet*, 9 Casey, 151, it was decided that a bailee, to whom logs had been delivered to be converted into boards, had a lien on them for his labor independent of any special agreement; and that he could maintain an action against an execution creditor of the bailor by whom they had been taken out of his possession. It is clear, under all the precedents, that unless the defendant here waived his lien by some such new agreement as that which the plaintiffs set up at the trial, he had the right to retain the cigars in controversy until he was paid for the work he had done in making them.

Nothing that was decided in *Macky v. Dillinger*, 23 P. F. Smith, 85, was in conflict with the settled law of lien. Dillinger consigned goods to Moorehead, who advanced \$1,500 on them, and then pledged them, with other property, to Macky, to secure a loan for \$3,700. Macky knew they belonged to Dillinger. When they were demanded by Dillinger, Macky refused to deliver them except on the condition that this loan to Moorehead should be paid. Nothing was said at the time of Moorehead's advances, and in the action of replevin which Dillinger brought, it was held that Macky had no right to set up Moorehead's lien in his own defense; that as against him Dillinger could maintain his action without tendering repayment either of the loan made by himself or of the advances made by Moorehead; and that the amount of the advances could be recouped from the damages Dillinger was entitled to recover. The decision was stated in the opinion of the present chief justice to rest on "the general doctrine of tender, that when a party declines to accept payment or performance, except in a particular way to which he is not entitled, he cannot insist that the action is prematurely brought."

[Omitting a question of pleading.]

Judgment reversed and venire facias de novo awarded.

DARLINGTON'S APPEAL.

(86 Penn. St. 512.)

Constructive fraud — husband and wife.

Two months after marriage a wife whose hearing and speech were defective, whose health was infirm, and whose mind was weak, conveyed all her real estate to her husband, for the consideration of one dollar, reserving a life estate. In the absence of affirmative evidence that her action was intelligent and free from undue influence, and that his conduct was fair and conscionable, *held*, that the transfer was void. *

BILL against several to compel performance of an award. The opinion states the facts. On the point in question, the complainant was defeated.

Joseph J. Lewis and Wayne Mac Veagh, for appellant.

Abner Pyle, William M. Hayes, and George W. Biddle, for appellees.

TRUNKY, J. An act or a contract, though not originating in any evil design or contrivance to injure another, yet tending to deceive and mislead, or violate private confidence, is a constructive fraud, equally reprehensible with actual fraud and prohibited by law. Constructive fraud often exists where the parties to the contract have a special confidential or fiduciary relation, which affords the power and means to one to take undue advantage of, or exercise undue influence over the other. Wherever, from such relation, considerable authority or influence necessarily exists on the one side,

* See *Pierce v. Pierce*, ante, p. 22, and note, p. 26.

In *Boyd v. De la Montagne*, 73 N. Y. 502, the same doctrine was held, the court observing: "It is not found that the defendant acted with a fraudulent intent in procuring the transfer, but I do not understand that this is necessary in this class of cases. A court of equity will interpose its jurisdiction to set aside instruments between persons occupying relations in which one party may naturally exercise an influence over the conduct of another. A husband occupies such a relation to the wife, and the equitable principles would apply to them in respect to gratuitous transfers by the wife to the husband, however it might be in ordinary business transactions which the wife may legally engage in. Where this relation exists the person obtaining the benefit must show, by the clearest evidence, that the gift was freely and deliberately made. The burden is upon the person taking the gift to show that the transaction was fair and proper. *Sears v. Shafer*, 6 N. Y. 266; *Houghton v. Houghton*, 15 Beav. 278; *Ford v. Harrington*, 16 N. Y. 235; 2 New. 384; *Coutts v. Acworth*, L. R. 8 Eq. 558-567; *Burnaby v. Griffin*, 3 Ves. 205."

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and a corresponding reliance and confidence is placed on the other, a party will not be suffered to abuse this authority or influence by extracting any advantage to himself. A transaction between persons so situated is watched with extreme jealousy and solicitude, and if there be found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party. Owing to the near connection between the parties, in many relations, the transaction in itself is considered so suspicious as to cast the burden of proof upon the person who seeks to support it, to show that he has taken no advantage of his influence or knowledge, and that the arrangement is fair and conscientious. For instance, the relation between attorney and client gives rise to great confidence and to very strong influence by the attorney over the actions, rights and interests of his client. The attorney is presumed to have the power to gain by the necessities, good-nature, liberality and credulity of his client, and to obtain undue advantages, bargains and gratuities. Hence the law often interposes to declare transactions between them void, which between other persons would be unobjectionable. This doctrine is said to rest upon the importance of preventing a general public mischief, which may be brought about by means, secret and inaccessible to judicial scrutiny, from the dangerous influences arising from the confidential relation of the parties. The principle, that, while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts, or bounty, or other negotiations of the former, supersedes the necessity of any inquiry into the particular means, extent and exertion of influence in a given case, a task often difficult and ill-supported by evidence, which can be drawn from any satisfactory sources. On the one hand, it is not necessary to establish that there has been fraud or imposition upon the client; and, on the other hand, it is not necessarily void throughout, *ipso facto*. But the burden of establishing its perfect fairness, adequacy and equity, is thrown upon the attorney. If no such proof is established, courts of equity treat the case as one of constructive fraud. In dealings between principal and agent, or guardian and ward, or trustee and *cestui que trust*, the same principles prevail with a larger and more comprehensive efficiency; and the burden of proof is upon the agent, the guardian, or the trustee, who claims a benefit arising from the transaction, to show the utmost good faith on his part, that he took no advantage of his influence or

knowledge, and that he brought every thing to the knowledge of the other party which he himself knew.

The foregoing principles are too familiar for citation of text-book or report. It is equally unnecessary to show by authority that the most dominant influence of all relations is that of the husband over his wife. From the proud and untutored savage to the cultured and refined Anglo-American, the wife is affectionately anxious to please her husband. This is first in her heart, whether she be in the menial service of a rude hut, or in daily toil for support of her family, or in charge of an elegant mansion. When he commands, she obeys; when he persuades, she yields; when he gently hints a wish, she grants. When treated almost as a servant — when governed and corrected as a child, as did our sturdy ancestors — or when confided in as a companion and equal, her will is subdued to her lord. True, there are exceptional women, whose nature is unaffected by marriage, who cannot yield or bend, and, as wives, would not be happy, save with effeminate husbands; but these are not so numerous as to cloud perception of the mental and moral differences of the sexes. The common-law rights and disabilities, consequent on marriage, grew out of these differences, and the husband's power and influence distinctly appear. "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs every thing; and is, therefore, called in our law-french a *feme covert*, *fœmina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*." One of the reasons for suspension of her legal existence is said to be "for her own security in guarding her against her husband's influence over her by disabling her from disposing of her own property." The disability to dispose of her own property, of course, related to her land, which she or her heir could hold and enjoy after the end of her husband's estate therein. By marriage he became entitled to all his wife's personalty and the use of her lands. Under advancing culture and civilization, modern legislation has materially changed the common law respecting the rights and disabilities incident to the marriage relation. In Pennsylvania, the wife may hold and enjoy her own property, and easy modes are provided for her disposal of it. But the unity of person remains,

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resting on a foundation older than the common law, and the husband's influence over his wife, so strongly expressed by the common-law writers, will end only with the marriage relation itself. The unfeeling greed, that, in a less refined age, transferred all the wife's personal property and the use of her real estate to her husband, is not entirely extinct. Many a husband, in all sincerity, believes the common-law rule better than the statute, for the former accords with his avarice. Such an one, as well as one who cares not for right, is inclined to get control of his wife's property; and to that end, if she does not readily and quickly yield, will subject her to like importunities as sent Martha Darlington weeping and asking advice; yet, in a little time, against the advice, compelled her to make a deed, acknowledged in due form, vesting her estate in her husband. Surely if anywhere the rule that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence, and that the arrangement is fair and conscientious, should be applied in a case where the wife conveyed her property to her husband.

In *Weeks v. Haas*, 3 W. & S. 520; GIBSON, C. J., said, in speaking of husband and wife: "Her dependence on him is more entire than the dependence incident to any other of the domestic relations; and the law relaxes its grasp on no means within its power to prevent him from misusing it. When it is her purpose to give him her land, the accomplishment of it by means of a conveyance to a convenient friend cannot be prevented, yet the step is so obviously the consequence of the husband's avarice, that it is seldom to be commended." When it is truly her purpose to give him her land it ought not to be prevented. But in determining if that was her purpose, when the step is obviously the consequence of her husband's avarice, will a rule of proof be adopted less favorable to her than to a client who dealt with his attorney, or to a principal who dealt with his agent? Ought not the rule to be more strictly adhered to as the relation is closer and more confidential? or as the one party is stronger and the other weaker?

The same great judge said, in *Watson v. Mercer*, 6 S. & R. 49: "The subordinate and dependent condition of the wife opens to the husband such an unbounded field to practice on her natural timidity, or to abuse a confidence, never sparingly reposed in return for even occasional and insidious kindness, that there is noth-

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ing, however unreasonable or unjust, to which he cannot procure her consent. The policy of the law should be, as far as possible, to narrow, rather than to widen the field of this controlling influence. * * * Where the conveyance is to a trustee, for the purpose of an immediate reconveyance to the husband, what honest mind would feel regret, that in the hurry of accomplishment some circumstance, merely formal, was omitted, by which the wife and her family were rescued from his rapacity? The very circumstances of a reconveyance ought to be satisfactory evidence of fraud by undue influence; and although I do not know that a chancellor would set aside the wife's deed on the same ground on which he interferes to defeat an advantage gained by a parent or guardian, while their influence over the child or ward is supposed to continue, still it ought to induce a court to lay hold of the slightest extrinsic circumstance to effect the same purpose." This dictum, uttered half a century ago in an ejectment, where the parties stood in like relation as in the pending case, and where the deed was held void for defective certificate of the wife's acknowledgment, shows that the judicial mind, observing the fruits of the act of 1770, was aroused to the importance of applying the rules relative to persons holding confidential relations, to transactions between husband and wife. So long as their common-law rights and disabilities were unaffected by statute, there could hardly have been occasion for application of those rules to them; but when statutes secure to married women their property, with right of its enjoyment and disposal, occasions arise when they need and ought to have the full benefit of rules established for the protection of persons, whose relations to others give the latter the power and means of exerting an undue influence over the former. The conveyance of a wife's estate for her husband's use will be held void, unless it affirmatively appears from the attending circumstances, or otherwise, that it was her voluntary act and not induced by his undue influence.

Coming to the facts of this case: In 1841, Joshua Darlington, aged forty-four years, a widower with five children, married Martha T. Haines, aged thirty-six years. Her father died in 1811, leaving no widow and no other child. From him she inherited the lands described in bill, except a small lot she purchased before her marriage. She had considerable personalty when married, and her husband lost no time in reducing it into his possession, making it absolutely his own. In about two months after their marriage, by

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procurement of the husband, deeds were prepared, one of which he and his wife executed, for a nominal consideration, conveying all her land to John H. Brinton, reserving to her a life estate; and, immediately, Brinton conveyed the same land to Joshua Darlington. These deeds he kept secret from her friends till 1868. He sold a lot in 1863 for \$1,000, which he received, and at that time took counsel to enable him and his wife to convey, without revealing the deeds executed in 1841. It is probable as a fact as well as a legal presumption, that she knew the contents of the deed to Brinton. No act was done or omitted to vitiate the acknowledgment. It seems she was not too imbecile to make a contract, but was dull of hearing, defective in speech, of infirm health, and mentally weak. Her husband rarely permitted her to make purchases, which act is excused by his having absorbed all her personal estate; and, from the day of his marriage, doing nothing but practicing economy so as to live on the income of the property derived from his wife. The master says that there is no evidence that he exerted undue influence over his wife to induce her to convey the land. The master thinks that in going to her neighbors, crying, complaining that her husband had got all her money and wanted her to give him the land, and asking advice, and saying she would never give it to him, "only proves that the subject was fully considered by her, and that she had opportunity of consulting with her friends, that she solicited their advice, and that she had resolved at that time not to yield to her husband." Without specially noting the inferences of the master, it is enough that there is no affirmative evidence that it was the purpose of that woman, free from her husband's undue influence, to give him the land, nor that his conduct was fair and conscionable. On the contrary, a weak-minded woman, having no near relations, soon after her marriage, is brought into the presence of her husband's attorney, and of his convenient friend, and of a magistrate; was there a very short time, but long enough to reluctantly convey the legal title of her land to her husband, and there is not a word in support of its fairness but the magistrate's certificate. What is that certificate worth, under the circumstances? As evidence, it has just the value of a declaration made in presence of her husband's friend, also of his attorney, at the time of the execution of the deed. That deed, acknowledged in due form by the wife, is as open to avoidance for actual or constructive fraud of her husband, as would be the deed of a client, duly ac-

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known, for like cause done by his attorney. This is too plain for question.

Here there are no innocent purchasers. The plaintiff is the heir of Martha T. Darlington. The defendants stand in the shoes of their ancestor. They have the bare legal title, but the equitable title is in the plaintiff.

[Omitting other considerations.]

The plaintiff is entitled to a decree against all the defendants.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

POOLEY V. WHITMORE.

(10 Heisk. 639.)

Partnership — non-commercial — negotiable paper.

A member of a publishing partnership executed his note for his individual debt and indorsed it in the firm name to a *bona fide* holder. *Held*, that the firm were not *prima facie* liable upon it.*

ACTION on promissory notes. The opinion states the facts. The opinion of the first hearing is omitted.

Smith & Kittredge, for plaintiffs.

Vance & Anderson, for defendant.

BURTON, J. Pooley, Barnum & Co. sued Edwin Whitmore & Co. on two promissory notes of \$185 each, made by W. A. Whitmore, payable at six and nine months respectively, to the order of "Whitmore Bros.," and indorsed in that name. Whitmore Bros., a firm composed of Edwin Whitmore and the said W. A. Whitmore, were partners in publishing the "Public Ledger" newspaper

* See *Smith v. Sloan* (27 Wis. 235), 19 Am. Rep. 737.

in the city of Memphis, and also conducted a general job printing office in that city. The notes in suit, however, were drawn and indorsed by W. A. Whitmore in discharge of a private debt that he owed to one Cannon. Edwin Whitmore is the surviving partner of the firm and puts in a special plea of *non est factum*, and insists that the firm is not bound to pay, on the ground that it is not a partnership debt. Defendants in error reply that they are *bona fide* purchasers, for value, of the note in due course of trade, and therefore are entitled to recover, notwithstanding the wrong or fraud of W. A. Whitmore in using the partnership name in a personal transaction.

The court below instructed the jury that "as a general rule, one partner is not liable for the act of another partner not within the scope of the partnership business. That if one partner sign a promissory note or other negotiable paper in the firm name, without the knowledge or consent of the other partner, and for a matter not within the scope of the partnership business, the other partner will not be liable unless he ratify the act or unless the paper gets into the hands of some purchaser before maturity, who had no knowledge or notice of the consideration between the original parties, and who paid a valuable consideration for the paper. That such a person would be an innocent holder for value, and without notice."

The above instructions are not accurate without important qualifications, and were certainly calculated, as we think, to mislead the jury, in view of the facts of this case.

Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is held responsible for whatever is done by any of its partners when acting for the firm, within the limits of the authority conferred by the nature of the business it carries on. Every person is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people. But no person is entitled to assume that any partner has a more extensive authority than that above described. It will be observed that what is necessary to carry on the partnership business in the ordinary way is made the test of an authority when no actual authority or ratification can be proved. This is conformable to the most recent and carefully considered decisions, but by

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adopting it, the liability of a firm for the acts of its copartners is not so extensive as now, lawyers sometimes imagine.

The question whether a given act can or cannot be necessary to the transaction of the business in the way in which it is usually carried on must evidently be determined by the nature of the business, and by the practice of persons engaged in it. Evidence on both of these points is necessarily admissible, and as readily may be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way, consequently no answer of any value can be given to the abstract question : can one partner bind his firm by such an act ? unless having regard to what is usual in business, it can be predicated of the act in question, either that it is one without which no business can be carried on, or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business, and not in another. Take for example, negotiable instruments. It may be necessary for one member of a firm of bankers to draw, accept or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous ; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no part of the ordinary business of a solicitor to draw, accept or indorse bills of exchange. The question, therefore, can one partner bind the firm by accepting bills in its name, admits of no general answer. The nature of the business and the practice of those who carry it on (usage or custom of the trade) must be known before any answer can be given. Lindley on Partnership, 198. It is further said by the same author, "It is clearly settled that any member of an ordinary trading partnership can bind the firm by drawing, accepting or indorsing bills of exchange, or by making and indorsing promissory notes in its name. But with respect to partnerships which are not trading partnerships, the question, whether one partner has any implied authority to bind his copartners by putting the name of the firm to a negotiable instrument, depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same

description. In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventures, quarry workers, farmers and solicitors." Id. 213-14.

The foregoing principles, as we think, have been fully recognized by this court in *Crosthwaite v. Ross*, 1 Hum. 23, where the distinction between partners in trade and partners in occupation or employment is taken, and the power of the former class to bind the firm by drawing or indorsing notes and bills, is sustained, while it is denied to the latter class. It is there held that one partner in the practice of physic could not bind the firm by drawing a bill or making a note on which to raise money, because it was not within the scope of their partnership and it was distinctly holden that the power to raise money was not one of the implied powers resulting from such an association. By recurring to the instructions given by the court below in this case, it will be seen that this important distinction between strictly commercial or trading partnerships, and partners in occupation is entirely ignored, and we think it was the duty of the court to point out the distinction, for *prima facie* it cannot be said that one partner in a printing office would have the implied power to bind the firm, by drawing or indorsing a note. In this case, to be sure, there was some evidence of the usage of this firm to deal in commercial paper, but there was also evidence tending to the contrary conclusion. The consequence of this distinction between trading and non-trading partnerships is very important in reference to the main defense to be relied upon in this case. If a partner in a banking firm, for instance, should indorse a bill or note for his private debt, and it should get into the hands of a *bona fide* holder without notice, his firm would be bound by it. The indorsing or making such paper, being the usual mode of conducting that business, the public have a right to suppose that each partner is empowered to accept or indorse for the firm, and are not bound to inquire whether in a given instance the act was done with the assent of his copartners. But not so with a partnership in occupation merely, whose business does not ordinarily require dealing in commercial paper. One who becomes a member of such a firm does not confer implied power on his copartners to bind him by dealing in bills or notes. He is not clothed with apparent power so to bind his firm, and no person dealing with the firm has the right to suppose that the powers of one member are more extensive than is implied by the

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ordinary mode of conducting such business. If two persons are associated in the practice of law and one of them, without or against the consent of the other, should indorse a note or bill for his private purpose, no one buying such bill could succeed on the plea that he was a *bona fide* holder without notice. For the reason that by forming such an association the several partners do not hold each other out to the world as empowered to use their names as makers or indorsers of negotiable paper.

3. The rules, in regard to notice to a purchaser, are very accurately laid down in our own cases, digested in Heiskell, and contain a much more accurate statement of the law upon the subject than is contained in this charge, and one much more applicable to the facts of the case.

Our conclusion is, that the charge of the court in reference to the facts of this case, if it does not amount to a positive misstatement of the law, was calculated to mislead the jury, and that the appellant is entitled to a new trial, although he failed to ask further instructions to the jury.

On hearing this cause at a former term, the court decided to grant a new trial, and it is now before us on application to reconsider the conclusion at which the court then arrived.

On a reconsideration of the case, we adhere to our former opinion, and reverse the judgment of the Municipal Court, and remand the cause for a new trial in accordance with the principles herein announced.

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(11 Heisk. 105.)

Negotiable paper — revival of liability of discharged indorser.

An indorser, whose liability has not been fixed by notice, and who, with knowledge thereof, subsequently either acknowledges his liability or promises to pay the note, is bound by such recognition.

BILL in chancery. The opinion sufficiently states the point.
Complainant had judgment.

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Brown & Hicks, for complainant.

Webb & Taylor, for defendant.

DEADERICK, J. [After stating pleadings and facts.] The liability of respondent as an indorser could only be fixed by demand and protest of the note and notice of non-payment. This is a rule of law established for the benefit of indorsers, and must be complied with to fix their liability, unless it has been distinctly and understandingly waived.

In 1 *Parsons on Notes and Bills*, 595, it is said, "although there is great fluctuation and uncertainty in the cases connected with this subject, yet the general principle seems now to be settled, in this country at least, and the earlier decisions in England, that where no demand has been made or notice given, a promise to pay after maturity, made with full knowledge of laches, is binding on the party promising, and removes entirely the effect of any negligence in making the demand or in giving the notice."

There should, however, be clear and distinct evidence of the promise.

When the indorser of a note said to plaintiff's agent that "in a few days he would see the agent and and arrange the note"; when the indorser said, "when he returned he would set matters to rights"; and "an acknowledgment of the debt, with a promise to send funds to take up a bill," and "a request for delay and promise to pay in a few days," are cases, with others given by the learned author, in which the promise was sufficiently made out. *Id.* 596-7.

So also in *Edwards on Bills and Notes*, p. 611, it is stated "that on proof of a promise to pay by an indorser, with knowledge that he was not liable on the bill, the holder may recover—not upon the ground that the indorser is bound by the promise as a matter of contract, for it wants consideration, but on the ground that a promise amounts to a waiver of the objection that the proper steps have not been taken to charge the indorser."

If, after the dishonor of a bill, the drawer distinctly promises to pay, that is evidence from which it may be inferred he has received notice of the dishonor. *Id.* 612, n. p. 652.

Admitted laches can only be waived by an unequivocal and direct promise to pay, made with full knowledge of the facts and circumstances, or by conduct and language which are equivalent to a direct promise. *Id.* 614.

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In *Durham v. Price*, 5 Yerg. 300, the court charged the jury, "if the indorser had promised to pay the note with knowledge that no demand was made of maker and no notice given to the indorser, they should find for the plaintiff." This court held the charge correct, saying "the express promise to pay is sufficient to dispense with proof of notice."

In *Martin v. Ewing*, 2 Humph. 561, Judge TURLEY says: "The law is, that a neglect to give notice of the non-payment of a bill or note may be waived by the person entitled to take advantage of it; that the payment of a part, or promise to pay, or any thing equivalent thereto, made by a person after a knowledge of the laches, amounts to a waiver of the consequences and admits the right of action. The effect of the promise to pay has been held to be not merely a waiver of the right to object to the laches, but to be an admission that the bill or note had been regularly presented and dishonored, and that due notice had been given." Citing *Chitty on Bills*, 533.

The learned judge then concludes by declaring: "If a man, as drawer or indorser of a note or bill of exchange, with the knowledge that proper steps have not been taken to charge him, promises to pay, he is bound thereby, and may be declared against as a drawer or indorser, whose liability has been legally fixed, because the promise is held to be an admission that the requisites of the law have been complied with, which he will not be permitted afterward to controvert. But if he promise to pay without a knowledge of the facts which discharge him, he is not bound thereby, and may make his defense."

In the case of *Spurlock v. The Union Bank*, 4 Humph. 336, Spurlock was sued as an indorser of a bill which was dishonored, but of which he had no notice. He paid \$140 on the bill, and admitted his liability to pay it. Judge TURLEY says the law is well settled by our courts and by foreign courts: "Let it suffice that it is held that if an indorser, with full and complete knowledge of his discharge, promise to pay, he shall be held to his promise. But this shall not be done if the promise be made under a mistake or misapprehension of the facts, or as to the law of his liability upon them." No express promise to pay is proved, nor does it appear that Spurlock had knowledge that he was not liable on the bill. For this latter reason the judgment against Spurlock was reversed.

This case does not hold that an acknowledgment of the liability

and promise to pay, with knowledge of discharge, are necessary, but distinctly re-affirms the doctrine of former cases—that the promise alone, with knowledge, etc., operates as a waiver. But the acknowledgment is treated in the opinion as equivalent to the promise to pay.

The cases in Tennessee may be thus far considered as uniform in holding that a promise to pay, with full knowledge of his discharge, will bind an indorser, not upon the ground that the promise is a new contract based upon the old consideration, but because the promise is held to be an admission that the bill or note had been regularly presented and dishonored, and that due notice thereof had been given. Other authorities hold the promise binding on the ground that the original debt is a sufficient consideration to sustain it. 3 Kent, 113, note *a*. Nor is it intimated in any of the cases which have been herein before cited of our own courts, nor in Parsons or Edwards on Bills and Notes, that in addition to the promise of the indorser there should be proof of an express admission of liability on the bill, in order to hold the indorser liable.

The question again came before this court in a case reported in 2 Head, 58, of *Golladay, Cheatham & Co. v. The Union Bank*, as drawers of a bill of exchange. The defense was, failure of notice of demand and refusal to pay. One of the firm wrote a letter to the bank, acknowledging their indebtedness and promising to pay. The court charged the jury, that if they believed the letter applied to the debt sued on, it would be a waiver of notice, and a promise to pay the debt notwithstanding there had been no notice; that, although the letter specified no particular debt as being due from defendants to plaintiff, in the absence of proof of the existence of any other debt, it might be presumed to apply to this debt. Judge CARUTHERS, in delivering the opinion of this court, said that the charge of the circuit judge was “right throughout, with the exception of the important qualification that an acknowledgment of the debt and promise to pay it, in order to amount to a waiver of demand or notice, must be made with a knowledge of his discharge at the time.” Citing Add. on Cont. 998; 3 Kent, 113; 4 Humph. 336. And adds that the full knowledge of his discharge is indispensable to the binding effect of such a promise.

It has already been shown that the case in 4 Humph. does not require that there should be a promise and acknowledgment both. On the contrary, in that case there was no proof of a promise to

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pay, but proof of an admission or acknowledgment of his liability, which the learned judge delivering the opinion assumes to be, and treats as equivalent to, a promise to pay. Judge TURLEY had previously held that a payment of part, or promise to pay, or any thing equivalent thereto, after knowledge of laches, amounts to a waiver. 2 Humph. 561.

Nor does the authority in 3 Kent, 113, support the proposition that both the acknowledgment of liability and promise to pay, with knowledge, etc., are necessary to constitute a waiver; but states that the promise to pay, with knowledge of discharge, will bind the party making the admission.

While, therefore, in the case in 2 Head there was both an acknowledgment and promise, it is not held that both are necessary, there being no question made upon such necessity, but the point in judgment was that the court had omitted to say, "if the defendant had full knowledge of his discharge," and for this omission the case was reversed; and the authorities cited by the learned judge do not warrant the construction sought to be placed upon his opinion. It does not hold, and did not intend to adjudicate, that both acknowledgment of liability and promise to pay were necessary to constitute a waiver.

In the case of *Ford v. Dallam*, 3 Cold. 67, the circuit judge had charged the jury that they might infer "from a subsequent promise to pay, or from a subsequent acknowledgment of liability, or from other circumstances, that defendant had due notice"; and the court refused to instruct the jury, as requested by defendant, that to constitute a waiver of notice three things were necessary — first, an acknowledgment of liability; second, a promise to pay the debt; third, it must be shown that such promise was made with a knowledge by indorser that he was discharged. His Honor Judge SHACKELFORD, in delivering the opinion of the court, said: "This court held in 4 Humph. 336, that there must be an acknowledgment of the debt and a promise to pay it by the drawer or indorser, to amount to a waiver of notice, and it must be made with a knowledge of his discharge at the time. The principle was again affirmed in 2 Head, 64, and is sustained in *Thornton v. Wynn*, 12 Wheat. 183."

We have already shown that the cases in 4 Humph. and 2 Head do not sustain the proposition of the concurrence of an acknowledgment of liability and a promise to pay; while in the case in 12

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Wheat. it is declared that "it is well settled as a principle of the law merchant that an unconditional promise by the drawer or indorser of a bill to pay it, after full knowledge of all the circumstances necessary to apprise him of his discharge from his responsibility by the laches of the holder, amounts to waiver and dispenses with proof of demand," etc.

Although the learned judge, in the case in 3 Col., said that the circuit judge erred in refusing the instructions asked by defendant's counsel, yet it is obvious from the opinion, and from the authorities cited, that the failure to show that the drawer had knowledge of his discharge when he made the promise was the chief ground upon which the judgment was properly reversed.

Upon a careful review of the cases, we are of opinion that the sound and safe rule has been stated in the cases in 2 and 4 Humph. and that it is not necessary that a formal acknowledgment of liability should be superadded to the promise to pay, to constitute a waiver of notice, when the proof shows full knowledge of discharge at the time the promise or acknowledgment is made by the drawer or indorser.

[Omitting question of fact.]

The result is that the decree of the Chancellor will be affirmed.

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(11 Helak. 206.)

Partnership — surviving partner as receiver — compensation.

A surviving partner, appointed receiver of the partnership affairs at his own instance, is not entitled to compensation as such receiver.

BILL, to settle a partnership, filed by the personal representatives of a deceased partner.

The defendant was appointed receiver upon his own application, and the chancellor allowed him \$1,000 for his services as such receiver. From this allowance the complainants appealed. Other questions are omitted.

Cocks & Henderson, for complainants.

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Brown & Hicks, for defendant.

McFARLAND, J. [After stating the case.] It is conceded that, as a general rule, receivers are entitled to reasonable compensation for their services. On the other hand, it is equally well settled that one partner cannot be allowed compensation for extra service in behalf of the firm, either before or after its dissolution, without an express stipulation to that effect. *Piper v. Smith*, 1 Head, 93, and authorities there cited. In a case where the surviving partner has been compelled to attend to the settlement of a large and complicated business, the rule may sometimes operate hardly, but it is too well settled to be now departed from. Shall we regard the defendant as having discharged these duties as receiver or as surviving partner? "A receiver is an indifferent person between the parties, appointed by the court to receive the property in question pending the suit, where it does not seem reasonable to the court that either party is competent to do so, as in the case of an infant." Daniel's Ch. Pr. 1406. He is an officer of the court and subject to its orders. In this cause, the property is returned to the defendant, upon his executing a bond and assuming to discharge the duties of a receiver. The duties discharged by the defendant in the settlement of the business are no more than, as surviving partner, he was bound to do without compensation; and this, in his answer, he claimed the right to do, and this right was allowed him upon his executing bond; for, had the chancellor strictly exercised the power of appointing a receiver, it would have resulted in the appointment of some indifferent person. It is true, as receiver, the defendant had to make his reports to the court, but he was allowed, without exception, his actual expenses for assistance in making his report; and these reports, so far as his own labor was concerned, were probably no more than would have been required of him in order to exhibit to the complainants, from time to time, the state of the business, as it would have been his duty to do had no suit been pending, and no more than would have been required of him had this suit been prosecuted without a receiver. As the bond he gave only required him to discharge faithfully his duties and account for assets in his hands, and, as we have seen he was already bound to this as surviving partner, the fact that he executed bond does not control the question. We think, as the defendant insisted upon his right as surviving partner to settle the business, he must

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be held to have done so under the same rule applicable in other cases, that is, without compensation. This exception should, therefore, have been sustained. We do not think the case of *Sykes v. Hastings*, 11 Ves. Jr., relied upon for the defendant, sustains his proposition.

[Omitting an exception,]

Exception sustained.

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(11 Heisk. 614.)

Principal and surety—discharge of principal.

A surety on a promissory note may plead in bar to an action on the note a judgment discharging the principal on account of the illegality of the note.

ACTION on a promissory note. The opinion states the facts. The defendant had judgment.

J. T. Shields, for plaintiff.

R. M. Barton, for defendant.

NICHOLSON, C. J. In October, 1862, Gill loaned to W. S. Creed \$1,500 in Confederate money, and took his note therefor, with D. Morris and another as sureties. In 1865, Gill attached the property of Creed, as an absconding debtor, for the purpose of satisfying the \$1,500 note. He obtained a judgment against Creed on the note, and a decree for the sale of the land attached. Creed appealed to the Supreme Court, and in 1866 the court held that the note was based on an illegal consideration, and dismissed the bill.

In 1870, Gill commenced his action of debt in the Circuit Court of Grainger county against Morris, on the note for \$1,500 made by Creed, and signed by Morris as security. Morris relied on the decree of this court, adjudging that the consideration of the note was illegal, as a bar to any recovery against him as a security of Creed. The court held that the decree was a bar, and gave judgment for Morris, from which Gill has appealed.

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It is conceded to be the settled law, that to make a former judgment a bar, it must have been a suit involving the same cause of action, between the same parties or their privies, and upon the merits. *McKissick v. McKissick*, 6 Humph. 75; *Hurst v. Means*, 2 Sneed, 546.

In the case of *Seat v. Cannon*, Judge TURLEY thus states the rule and the reason of it: "It is a well-settled principle of law, that no one who is not a party or in the relation of a representative of a party, is estopped from inquiry into the merits of a judgment by which his rights are sought to be affected, for the plain common-sense reason, that he shall not be judged without being heard." This was said in regard to the right of a security of an administrator to resist a suit against him on the bond, after judgment had been rendered against the administrator, his principal.

Upon the principle here laid down, it is clear that if this court, instead of holding that the note was void because of illegality in the consideration, had held that Confederate money was a good consideration, and for that reason had given judgment for Gill against Creed, upon a subsequent suit against Morris as surety he would not have been precluded, by reason of the judgment against his principal, from resisting a recovery; and this, in the language of Judge TURLEY, "upon the common-sense reason that he shall not be judged without being heard."

But here this court held that the note was void as against Creed, the principal, because given on an illegal consideration. That holding is to be followed as the law of that case, however erroneous we now regard it. That case was between Gill, the payee of the note, and Creed, the principal payer. As between them, the law was settled that Gill could have no recovery on that note against Creed. Under our law, Gill was not prevented, by reason of the judgment in favor of Creed, from instituting another suit on the same note against either of the other makers of the note. This right is expressly secured to him by the statute. If he had been met by the plea of *res judicata*, the answer that the former suit was between different parties would have been conclusive, unless it could be shown that Morris occupied toward Creed the relation of a representative or privy. But by our statute all joint obligations are made joint and several, and the obligee may sue all the obligors jointly, or he may sue them all successively. It follows

that the relation of representative or privy did not exist between them, and, therefore, that the former suit and the present not being between the same parties, the former judgment is *res inter alios acta*, and cannot be pleaded as an estoppel.

By the civil law, the case of principal and surety does not fall within the rule of *res inter alios acta*. By the civil law, the surety accedes to, and becomes bound immediately by, the contract of the principal, and the former taking the place of the latter for any purpose of responsibility, whether actual or contingent. Pothier Oblig., part 2, ch. 6, § 1. But by the common law, the surety is bound by the terms of his own engagement, without regard to the stipulations of his principal. Hence, as by the civil law, the surety is treated as a representative or privy of the principal, a judgment for or against the principal is an estoppel against a subsequent suit against the surety. But by the common law, and by our own as regulated by statute, the surety not being regarded as a representative or privy, the common-law rule, or *res inter alios acta*, prevails.

This question is elaborately examined in 2 Am. Lead. Cases, 378 to 457, where the authorities are reviewed, and the rule laid down as follows: "When the contract into which the principal and surety have entered is purely joint in its origin, or is rendered so by the form in which action has been brought upon it, a judgment for or against the former will, of course, be a complete bar to any future proceedings against the latter, as a consequence of the general rule of law, and apart from the peculiar relations existing between them. Whenever, however, their obligations arise, either out of distinct contracts, or out of a contract joint and several in its nature, it is somewhat difficult to determine whether one can be bound or released by a judicial determination for or against the other. The estoppel of judgment is limited to parties and privies. 2 Smith's Lead. Cas. (5th Am. ed.) 683. And it would seem plain that there is nothing in the relation between joint contractors, whether they stand in the position of principal and surety, or are both principals, to render them privies to any suit or action in which they are not parties."

But while the weight of authority fully sustains the general proposition, that a judgment for or against the principal is *res inter alios acta*, and therefore cannot operate as an estoppel in a subsequent proceeding between the creditor and the surety, yet it seems impossible to reconcile this rule, in its full extent, with the well-

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established principle that every thing which operates as a partial or total exoneration of the principal, will necessarily have the same effect in favor of the surety. It is obvious that if the rule of *res inter alios acta* is applied to a case in which the principal has been discharged, there may be a judgment against a surety who will either have no indemnity against his principal, or if he has, then the principal will be indirectly subjected to a liability from which he had been legally discharged. In view of the difficulty in harmonizing the conflict between the two rules in the case stated, the editor of the Am. Lead. Cases, vol. 2, p. 440, says: "Hence, while the estoppel of the judgment, viewed solely as a judicial sentence, will be confined to the parties between whom it is rendered, it will, notwithstanding, have the same effect as any other transaction which gives the principal rights inconsistent with those which the creditor seeks to enforce against the surety, and will constitute a defense which would always have been good in equity, and which should now be sustained in a court of law."

The result is that, when suit is brought against a surety for a debt from which the principal has been discharged by a court of competent jurisdiction, the surety is entitled, upon proof of the fact of valid discharge, to rely upon the judgment of discharge as an estoppel; and this must be regarded as an exception to the general rule of *res inter alios acta*.

It follows that there was no error in the judgment, and the same is affirmed.

Judgment affirmed.

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(12 Helsk. 7.)

Partnership — notice of dissolution.

Notice of dissolution of a partnership was published in a newspaper, and a copy thereof, with a red line drawn about the notice, was mailed to an actual dealer residing in another place. *Held*, not alone sufficient to charge such dealer with notice.*

ACTION on account. The opinion states the facts. Judgment for plaintiffs.

* See *Austin v. Holland* (60 N. Y. 571), 25 Am. Rep. 248, and note, 249.

A. W. Campbell, for plaintiffs.

Allen & Tyler, for defendants.

SNEED, J. This action is upon an account for merchandise sold by the plaintiffs, who are wholesale merchants in the city of Louisville, Ky., to the defendants, who were retail merchants in the town of Paris, Tenn. It is sought to charge W. L. Carter, Sr., as a member of the firm of Carter & Upton, for goods sold in March and May, 1870, after he had retired from the firm, and had been succeeded by his son, W. L. Carter, Jr., to whom the father had transferred his interest, and who, with the defendant Upton, continued the business under the same style of Carter & Upton.

W. L. Carter, Sr., and defendant Upton were in business under the firm name of Carter & Upton in October, 1868, when they began their dealings with these plaintiffs. They continued to buy goods of the plaintiffs until December, 1869, when W. L. Carter, Sr., transferred to his son, W. L. Carter, Jr., his interest, and retired from the firm. During the existence of the first firm, the defendant Upton did the buying; and upon the formation of the new firm, he continued to do it; and in March and May, 1870, he bought for the new firm the two bills of goods, the price of which is the subject of this action.

The controversy in the trial below was, whether the plaintiffs, who now seek to hold the old firm liable, had notice of the dissolution. The depositions of each of the individual members of the plaintiffs' firm were taken in the cause, and they severally prove that they had no notice, in any form, of such dissolution. On the other hand, the defendant Upton deposes that when he bought the goods he informed the plaintiffs, Mr. Harvell that Carter, Sr., had retired during the previous December, and that Carter, Jr., had taken his place. It is, moreover, stated by Carter, Jr., in his testimony given on the 9th of October, 1872, that, at the time of the dissolution, his father instructed him to publish the fact in a gazette published in Paris, called "The Intelligencer," and to send a copy to the plaintiffs, as well as others with whom the old firm had been dealing; and that he did this, and marked the advertisement with a red circle, so as to call the special attention of plaintiffs to it. But a letter is produced in evidence written by Carter, Jr., in September, 1871, after this suit was brought, in which he writes to the plaintiffs that he had thus advertised, and had dis-

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tributed copies among the correspondents and dealers with the old firm; but he does not remember whether the plaintiffs were thus notified or not. There was judgment by default against Upton, and a verdict and judgment against Carter, Sr., who has appealed in error.

The court charged the jury that "the fact that notice of the dissolution may have been published in a newspaper, and a copy of the paper sent or delivered to the plaintiffs, will not of itself prove notice. It is a circumstance which the jury may look to, together with all other facts proven, with the view of determining whether the plaintiffs had notice of the dissolution." This is assigned as error.

It is laid down in the books, that this question, as to what shall amount to due and sufficient notice of the retirement of a partner, is one of considerable nicety and difficulty; that such notice need not be express, but may be constructive, and implied from circumstances. As to previous dealers with the firm, and parties who stand indifferent at the time of the dissolution, the rule as to notice rests upon different principles. As to the latter, a newspaper advertisement, without more, is sufficient; but as to the former, it is requisite that actual notice be brought home to them. It may be implied, however, from circumstances; nor is it material in what manner it is given. Collyer on Partnership, §§ 532-4.

Now this case was presented to the jury in a peculiar aspect. These plaintiffs had been dealers with the firm of Carter & Upton previously to the dissolution, and that firm was always represented in its purchases by the active business partner, Upton. The name and style of the firm was unchanged after the dissolution. It was still represented in its purchases by Upton, who, we are to assume, was the general business partner conducting the correspondence of the firm. The newspaper containing the notice of dissolution was directed and transmitted by young Carter, with whom it is not shown the plaintiffs had ever had any correspondence. The fact of actual notice is flatly denied by every member of the plaintiffs' firm; and we cannot see, under the facts of the case, how the act of transmitting the newspaper can be regarded as any thing more than a circumstance to be considered in connection with the whole body of the proof, to ascertain whether the notice of the dissolution had actually been brought home to the plaintiffs. It would have been an easy task, and certainly it was the dictate of prudence, to trans-

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mit the information in the form of a circular letter, or in some other mode more likely to attract attention than a village newspaper.

In the case of *Hutchins v. The Bank of Tennessee*, 8 Humph. 422, this court said that the publication of such a notice, even in a journal to which the party to be affected with notice is a regular subscriber, is not like a letter addressed to the party giving the fact; for that the latter is a direct notice, and it is the party's own fault if he fail to open the letter. That the newspaper advertisement does not constitute actual notice, but is a circumstance as to the fact of actual notice to be left to the jury for their consideration in forming their verdict.

If this be so as to a journal to which the party is a regular subscriber, we see no reason for a different rule in regard to one sent in an unknown handwriting and for the first and only time.

These plaintiffs had been advised by defendant Upton that Carter, Sr., was the moneyed man of the old firm, and they state that if they had known of the dissolution their credit would have been withdrawn. The new firm saw proper to continue business under the identical style of the old firm, and previous dealers might well have been deluded into the belief that Carter, Sr., was still a member of the firm.

We hold that the circuit judge did not err in the charge to which exception is taken.

Judgment affirmed.

MEMPHIS V. WOODWARD.

(12 Heisk. 499.)

Officer de jure, when entitled to salary.

A city physician was duly elected, but was prevented by injunction at the suit of the prior incumbent, from taking possession of the office, and the latter drew the salary for some months thereafter. The injunction having been set aside, *held*, that the former was entitled to recover salary for that period from the city. (*See note, p. 754.*)

ACTION for salary. The opinion states the facts. Judgment for plaintiff.

W. M. Randolph, for plaintiff.

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L. D. McKisick, for defendant.

NICHOLSON, C. J. Woodward sued the mayor and aldermen of Memphis, in the Circuit Court of Shelby county, for his salary as physician to the city hospital, from October 23, 1866, to April, 1867, when the office was discontinued. The facts were agreed on, and submitted to Judge HEISKELL, without the intervention of a jury. He found in favor of the plaintiff below and the defendant has appealed. The facts on which the questions arise are as follows:

Lynch was physician to the hospital until October, 1866, when his office became vacant, and Woodward was duly elected, gave bond, which was accepted, and took the prescribed oath. The mayor went with Woodward to put him in possession of the paraphernalia of the office, and finding Lynch in the office, informed him of the object of the visit, when Lynch asked for a few hours' time to move his family, which being conceded to him, thereupon, instead of moving his family, he applied for and obtained an injunction from Judge HUNTER, requiring the mayor and Woodward absolutely to desist and refrain from interfering with him in the enjoyment of the office. Upon final hearing, this injunction was perpetuated by the chancellor; but upon an appeal by Woodward to the Supreme Court, the decree of the chancellor was reversed at the April term, 1867. Judge MILLIGAN, giving the opinion of the court, said: "So it follows that in either event the office of city hospital physician was vacant at the election of Dr. Woodward in October, 1866, and that he was lawfully elected to the office by a competent and lawful board, and as such is entitled to all the privileges and emoluments of the office." *Lynch v. Lafland et al.*, 4 Cold. 103.

Lynch continued in the enjoyment of the office, receiving its salary, \$225 per month, until the office was discontinued in April, 1867. So that Woodward, although entitled to the office, never actually performed any of its duties, though he was ready and willing all the time to do so, and he never received any of the salary, though he frequently demanded it. The injunction continued in force until the office was discontinued.

The question upon these facts is, whether the mayor and aldermen were liable to pay the salary of Dr. Woodward, although they had paid Dr. Lynch for the same term of service, during which Dr. Woodward was entitled to the office and its salary.

The decision in the case of *Lynch v. Lafland et al.* is conclusive as to Woodward's title to the office and to the emoluments.

The right to exercise a public office is a species of property, equally with any other thing capable of possession, and the law affords adequate redress when the enjoyment of it is wrongfully prevented. 3 Kent, 454; 2 Ala. (N. S.) 31. The same doctrine is recognized in *Dodd v. Weaver*, 2 Sneed, 673.

But the right to the office does not entitle the officer to the compensation as under a contract; he takes it subject to the authority of the creating power to modify the compensation, or to discontinue the office. *Haynes v. The State*, 3 Humph. 480; *Hoke v. Henderson*, 4 Dev. 1. With this qualification, the officer is entitled to the office and to its emoluments, and to redress for interference with his rights.

It is conceded in the argument, that Woodward is entitled to his remedy against Lynch, for holding the office and receiving the salary to which Woodward was entitled. It is conceded, also, that, if the mayor and aldermen had placed Woodward in a position in which he could not perform the duties of the office, he could then recover his salary. We may add, that it is equally clear that, as Woodward was in reality entitled to the salary of the office, if the mayor and aldermen declined to pay it to him, but actually paid it to Lynch, who was wrongfully holding the office, this payment was wrongful, and did not discharge the liability of the mayor and aldermen to Woodward.

If Lynch was wrongfully in the office, could the mayor and aldermen have been compelled to pay him the salary?

In *Pearce v. Hawkins*, 2 Swan, 89, the court said: "It is true, that being invested with the forms of office, his official acts will be deemed good and valid as to third persons in the same manner as if he had been an officer *de jure*. But when put on his own defense he cannot justify under his office, if it appear that he is not a legal officer, but only an officer *de facto*."

If such an officer could not defend on such an office, it seems to be a legitimate conclusion that if he seeks to rest his claim to compensation upon his rights under such office, he will be repelled if he cannot show his title to the office.

In the case of *The People v. Tieman*, 30 Barb. 193, the court said: "When an individual claims by action the office, or the incidents to the office, he can recover only upon proof of title."

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But it is insisted for the mayor and aldermen, that the salary was paid to Lynch under the operation of the injunction, and that they are protected against the claim of Woodward by reason of the payment so made.

As already stated, the injunction restrained the mayor and aldermen from "interfering with Lynch in the enjoyment of the office of city physician and the discharge of the duties thereof," etc.; but there was nothing expressly requiring the mayor and aldermen to pay the salary of the office to Lynch; nor could this be implied. A mandatory injunction is to be strictly construed. Kerr on Injunctions, 534. The mayor and aldermen could have withheld the salary without violating the injunction. What, then, is the effect of a payment made to Lynch, who was not legally entitled to it, under an injunction which was afterward dissolved because it had been granted erroneously?

Whatever may be the legal effect of such a payment as between the mayor and aldermen and Lynch, we know of no principle upon which it can be held to be a satisfaction of Woodward's claim. He was virtually inducted into the office, and by an evasion, Lynch obtained time to move his family, and availed himself of it to obtain an injunction which prevented Woodward from actually enjoying the benefits of the office to which, together with its emoluments, this court held that he was entitled. The injunction restraining the mayor and aldermen from placing Woodward in the office, and restraining him from entering into it and receiving its emoluments, was wrongfully granted. It was held in effect, that Woodward was entitled to the salary paid to Lynch; but it would be palpable injustice now to hold that the payments thus made to Lynch under an erroneous order of the court, and especially when the order did not so require, should operate as a satisfaction of Woodward's claim to the emoluments of the office. It was not in the power of the chancellor to make such an order except in the event that Woodward was not legally entitled to the office. Woodward's claim to the salary followed his title to the office, and no payment of money that belonged rightfully to Woodward, although made under an erroneous order of the court, could operate as a payment or satisfaction of his claim.

The authorities to which we have been referred, in cases where officers *de facto* received fees for the performance of services, do

not control this case, even if they were correctly decided, as to which we express no opinion.

We are, therefore, of the opinion that there was no error in the judgment, and affirm it.

Judgment affirmed.

NOTE BY THE REPORTER.—This decision is opposed to the weight of authority. The contrary doctrine is held in New York, Michigan, Minnesota, Mississippi, Kentucky and Kansas. See *Commissioners of Saline Co. v. Anderson*, ante, 171, and cases there cited and referred to. In *Smith v. Mayor*, 37 N. Y. 518, the court said: "An office in this country is not property, nor are the prospective fees of an office the property of the incumbent. *Connor v. Mayor*, 1 Seld. 285. The incumbent cannot sell his office or purchase it, or incumber it. It will not pass by an assignment of all his property, nor will such assignment affect his right to prospective fees. *Id.*, and cases cited, p. 290. The legislature may diminish or abolish the fees at pleasure, or may render it a salaried office." "The same authority holds, and it is conceded by the appellants here, that the right to fees or compensation does not grow out of any contract between the government and the officer, but arises from the rendition of the services. *Id.*; *Dartmouth College v. Woodward*, 4 Wheat. 627; *The People v. Warner*, 7 Hill, 8; s. c., 2 Denio, 272. An office is simply an appointment or authority on behalf of the government to perform certain duties, usually at and for a certain compensation. Both the office itself and the compensation, upon general principles of law, are entirely within the control of the government, to diminish, increase or abolish. So, it may at any moment be given up by the incumbent. There can be neither property nor contract in such a subject. It is but a deputation for the benefit and advantage of the government. As the plaintiff has no contract with the city of New York, upon the principles stated, there could be no indebtedness for a breach of its terms, and the plaintiff's action must fail."

The case of *People v. Ticman*, 30 Barb. 193, cited in the principal case, and also in the California cases, and remarked upon in *Commissioners of Saline Co. v. Anderson*, ante, p. 171, seems to have been misunderstood. That was an action by the *de facto* officer to recover his salary, and the court hold that he cannot recover, but they do not deny that, if it had been paid him, it would have been valid as against a claim by the *de jure* officer for the same salary. "The salary and fees are incident to the title and not to the usurpation and colorable possession of an office. An officer *de facto* may be protected in the performance of acts done in good faith in the discharge of the duties of an office under color of right, and third persons will not be permitted to question the validity of his acts by impeaching his title to the office." "It does not follow that a right can be asserted and enforced on behalf of one who acts merely under color of office without legal authority, as if he were an officer *de jure*. When an individual claims by action the office, or the incidents to the office, he can recover only upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot as against the public be converted into a weapon of attack, to secure the fruits of the usurpation and the incidents of the office." This case is still law in New York, notwithstanding the statement to the contrary in *Commissioners of Saline Co. v. Anderson*, ante, 171, and in *Auditors of Wayne Co. v. Benoit* (20 Mich. 176), 4 Am. Rep. 384. Indeed, it is cited as authority in *Dolan v. Mayor* (68 N. Y. 279), 23 Am. Rep. 168, where the distinction between an action by the *de facto* officer and one by the *de jure* officer is pointed out, and where it is held that payment to the *de facto* officer, while in possession of the office, was a good defense to an action by the *de jure* officer for the same salary after he had acquired possession.

The California cases of *Dorsey v. Smyth*, 28 Cal. 21, and *Carroll v. Stebenthaler*, 37 Id. 199 agree with the principal case, but they are founded upon a mistaken construction of *People v. Ticman*.

In *Queen v. Mayor of Cambridge*, 12 Ad. & Ell. 708, the defendant had under statutory authority removed a town clerk, elected to hold during good behavior, but who had not made the declaration required by statute. Held, that, as an officer *de facto*, he was entitled

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to compensation provided by that statute, although he had not made the declaration. The judges said he was in office until removed, and thus entitled to compensation, and if he had not been removed might have cured the defect by taking the declaration.

The *de jure* officer may recover from the *de facto* officer the fees and emoluments received by him while in office, less the necessary expenses in earning them. *Mayfield v. Moore* (53 Ill. 428), 5 Am. Rep. 53; *Howard v. Wood*, 2 Lev 245; *Glasscock v. Lyons*, 20 Ind. 1; *Dolan v. Mayor* (66 N. Y. 274), 23 Am. Rep. 168.

NIBLETT V. NASHVILLE.

(12 Helsk. 684.)

Municipal corporation — negligence — excavation at side of alley.

A religious corporation made an excavation inadequately guarded, at the side of a public alley in a city, for entrance to the basement of their church. The plaintiff fell into it in the dark and was injured, while attempting to cross the alley. *Held*, that the city was liable to him for the injury, although the excavation was not on the travelled portion of the alley. (*See note*, p. 757.)

ACTION for negligence. The opinion states the facts. Judgment for defendant.

Quarles & Thoma, for plaintiff.

W. K. McAlister, city attorney, and *John Lellyett*, for defendant.

FREEMAN, J. This action was brought to recover damages for an injury sustained by falling into an excavation adjoining the McKendree church in the city of Nashville.

There appears to be an alley running from Church street along the side of the property of the church situated on this alley and extending to the edge of it. The church had made an excavation along the side of the wall of its building, some six or seven feet deep, for convenient entrance into the basement. Immediately on the edge of the street, a curbing of stone twelve or fourteen inches high had been erected. The plaintiff, in endeavoring to cross the alley and approach the house, the night being dark, fell over this curbing into the excavation, and thus received the injury complained of.

The original declaration filed in the case averred, in substance,

that the area or pitfall wrongfully permitted by the corporation was "in and on a public alley and common highway" of the city. Issues were made up on this declaration which had been filed at the January term, 1871. An amended count was filed at the May term, 1872, which averred that the pitfall or excavation from which the injury was received was adjacent and contiguous to the alley and immediately on side of it.

His honor, the circuit judge, at the trial charged the jury that if the proof showed that the excavation was not "in and on" the alley, but adjacent to it, then the plaintiff could not recover on the first count of the declaration.

[Omitting a question of pleading.]

Assuming this to be the fair construction of the declaration, the question then arises, whether such an obstruction, or interference with the free use of the highway, if permitted by the corporation, though not immediately in the alley, is one for which the corporation will be held responsible if injury therefrom has occurred to one passing along said alley.

We think the true rule may be stated to be, that if an obstruction or excavation be permitted which renders the alley, street, or highway, unsafe or dangerous to persons or vehicles, whether it lie immediately in or on the alley, street or highway, or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway, it is such a nuisance as renders the corporation liable.

Such is the doctrine of the case of the *Franklin Turnpike Co. v. N. Crockett*, 2 Sneed, 271, and such is the result of numerous authorities to which we have been referred in the briefs of counsel. See *Memphis v. Lasser*, 9 Humph. 757; *Burnham v. Boston*, 10 Allen, 290.

A party bound to keep a highway in repair and open for the passage of the public in a city by night or by day, certainly cannot be held to perform that duty by simply keeping the area of the highway free, while along its edge there is a well or excavation uninclosed, into which the passenger, by an inadvertent step or an accidental stumble, might fall at any time.

Such an excavation might be all the more dangerous by being immediately on the side of an alley or street rather than in it, as in the latter case it would be notorious as dangerous, and would be shunned by all; while in the former case no such attention might

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be directed to it, and the unsuspecting passenger, by a mere accidental step, would be liable to be precipitated into it and thus seriously injured. See the case of *Oliver v. Worcester*, 102 Mass. 489; 3 Am. Rep. 485.

We therefore hold that his Honor erred in his instructions to the jury, and the judgment must be reversed.

[Omitting an immaterial remark.]

Judgment reversed.

NOTE BY THE REPORTER. — In *Burnham v. City of Boston*, 10 Allen, 393, the court *arguendo* draw a distinction between a city street and a country highway. That was a case of injury to one coming on the highway laterally. The court say: "Doubtless in many cases it would be a proper exercise of due and reasonable care to place a single barrier across a way or street which was defective and dangerous, sufficient to stop persons from passing over it by the usually travelled path. Such a precaution, for example, would be an adequate protection against accident on a highway in the country, which was not wrought for travel throughout its entire limits, or in places where the adjoining lands were so fenced by the owners, or natural obstacles were so interposed that access to the way laterally was either unusual or difficult. But a very different standard of diligence would be applicable where a way or street was within the limits of a city or town, and was prepared for travel and actually used in every part, and to which constant access was had from private ways over lands of adjacent proprietors, entering it at the side."

In *Snow v. Inhabitants of Adams*, 1 Cush. 443, a declaration alleging that the highway was obstructed by large quantities of logs, planks, slabs, and boards, piled up and extending along either side of the highway, and so near to the beaten track and travelled path as to be a great nuisance, and dangerous to travellers," etc., was held good as an allegation that the obstruction was within the road.

Franklin Turnpike Co. v. Crockett, 3 Sneed, 263, was the case of an injury caused by the collision of a horse and wagon against a telegraph pole at the side of the road. It was left to the jury to say whether there was a sufficient road. The court said the pole was not *per se* a nuisance, but "in case of defect in its construction or repair, a post, tree, pit, or other obstruction, within the line of the ditches, and even out of it, may prove to be a nuisance, where by reason of such defect the safety of travel is endangered. As, for instance, if a decayed tree be near and over-hang the road, or if a pit be opened near its margin, or a precipice or bridge remain without guards, or the like."

In *Mayor v. Memphis*, 9 Humph. 737, the injury was caused by a cistern occupying about two-thirds of the width of a city sidewalk, and left unguarded. A recovery was sustained.

In *Fishay v. Glen Haven* (25 Wis. 396), 3 Am. Rep. 73, it was held that objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such deficiencies in the way as to render the town liable, even though so far removed from the travelled path as to avoid all danger of collision. This was founded on *Morse v. Richmond*, 41 Vt. 435. See, also, *Manderschil v. City of Dubuque* (29 Iowa, 73), 4 Am. Rep. 196; *Bassett v. City of St. Joseph* (53 Mo. 290), 14 Am. Rep. 446; *Hey v. Philadelphia* (81 Penn. St. 44), 23 Am. Rep. 733; *Puffer v. Inhabitants of Orange* (122 Mass. 389), 23 Am. Rep. 368.

In *Cogswell v. Inhabitants of Lexington*, 4 Cush. 307, the obstruction was a post near the true line of the highway, which was not indicated by any visible objects, and within the limits of the general course and direction of travel, and where travellers were accustomed to pass. This was held within the road so as to warrant a recovery for an injury sustained by driving against it.

In *Cassedy v. Stockbridge*, 31 Vt. 391, the obstacle was a sled crook lying at the side of the road, the end being two feet from the wheel track, and over which the plaintiff accidentally drove by, his horse suddenly springing to that side. It was properly left to the jury to say whether the road was sufficient and whether the crook was within the road.

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The court distinguish this from *Rice v. Montpelier*, 19 Vt. 470, where the plaintiff voluntarily and unnecessarily drove on the side of the road to get the benefit of the snow, and there being injured, the town was held not to be liable, and seem to disapprove the remark there that the town would not be liable if the plaintiff's "horse took the same direction from a natural instinct, or from inability to see the road on account of the darkness."

In *Johnson v. Whitefield*, 18 Me. 286, it was held that to allow the sides of the travelled path, to become incumbered by logs or other things unnecessarily placed there, subjects the town to the payment of damages occasioned thereby. Here the obstacle was a cedar log lying by the side of the road. But in *Perkins v. Fayette*, 68 Me. 152, where the obstacles were stumps and stones removed to the side of the road in repairing the way, and against which the plaintiff's horse, frightened by a cow in the road with a board on her horns, upset the plaintiff's wagon, the town was held not liable. But this was put not only on the necessity of the obstacle, but on the double nature of the cause producing the injury, namely the fright of the horse and the presence of the obstacle. In *Blake v. Newfield*, id. 285, the plaintiff, on account of a trench dug across the road by an adjacent owner, turned into a field, and in returning to the road the carriage struck a rock within the limits of the highway, but outside the travelled portion, and she was injured. Held, that the town was not liable. The court say her remedy was to fill up the ditch." They cite *Howard v. North Bridgewater*, 16 Pick. 189; *Tisdale v. Norton*, 8 Metc. 388; *Shepardson v. Olerain*, 13 id. 55; *Smith v. Wendell*, 7 Cush. 498; *Kellogg v. Northampton*, 4 Gray, 65, and observe: "The town is under no more obligation to remove stones or other obstacles naturally existing in the soil, within the limits of the way but outside of that portion of it prepared for travel, than it is to remove similar objects in the adjoining fields. That which was not a defect before cannot be made so by another and an independent defect having no connection with it."

In *Tisdale v. Inhabitants of Norton*, 8 Metc. 388, it was held that an action against the town to recover damages for an injury received by reason of a defect or want of repair in a highway, which the town by law is bound to repair, cannot be maintained by a party who goes out of the highway, because of the defect therein, into the adjoining land, and there receives the injury. Here the plaintiff drove into a pond outside the highway limits. The traveller is bound, say the court, "to make use of some other public way; otherwise, he proceeds at his own peril."

It has been held, where the highway has been laid out and established of a certain width by statute, to be no justification on an indictment for this offense, that the obstruction is placed in a part of the highway which has not been prepared, and cannot be used for travel by reason of ledges of rocks and stones and that said obstruction does not obstruct or hinder the travel thereon. The court distinguished between the right of the public or town, as against the individual for an obstruction, and the right of the individual by private action under the statutes, as against the town, for a defect or want of repair. The latter, it is said, "only requires a road of proper width, and kept in good repair. But the town on the other hand, to enable itself to discharge its obligation to the public, requires the full and entire width of the whole located highway. The space between the made road and the exterior limits of the located highway may be required for various purposes; as for making and keeping in repair the travelled path; for making sluices and water-courses; for furnishing earth to raise the road, and, not unfrequently, from the location of the road, and from the exposure to be obstructed by snow, the entire width of the located road is required to be kept open, to guard against accumulations of snow that might otherwise wholly obstruct the public travel at such seasons. For these and other uses, in aid of what is the leading object, the keeping in good repair the made or travelled road, the general easement in the public, acquired by the location of a highway, is co-extensive with the exterior limits of the located highway; and the question of nuisance or no nuisance does not depend upon the fact whether that part of the highway, which is alleged to have been unlawfully entered upon and obstructed by the defendant, was a portion of the highway capable of being used by the traveller. *Commonwealth v. King*, 13 Metc. (Mass.) 115 *People v. Cunningham*, 1 Denio, 524.

Hollis v. Staley.

HOLLIS v. STALEY.

(8 Baxt. 187.)

Partnership — rights of creditors after dissolution and assumption of obligations by a portion of firm.

One partner retired from the firm, selling his interest to the remaining partner, he agreeing to pay the firm debts, and having sufficient property to do so. That property having been wasted, a firm creditor being unable to enforce his claim, filed a bill to reach property which the outgoing partner had withdrawn from the firm when he retired. *Held*, that he had no equitable lien thereon.

BILL to enforce an equitable lien. The opinion states the facts.

J. H. Windle, for Hollis, Wright & Co.

John P. Murray and *Deaton*, for Staley.

SNEED, J. The defendants being partners in trade, and indebted to the complainants, dissolved their partnership, and gave notice thereof. The defendant, E. D. Staley, retired under an agreement with James Staley that the latter would assume and pay the firm debts, retaining, as the proof shows, ample assets for that purpose. The defendant, E. D. Staley, upon his retirement, and a settlement between the partners, withdrew, of the property alleged to belong to the firm, a wagon and two mules. It seems that the complainants did not prosecute their remedies against James Staley promptly, and the assets were ultimately wasted, both parties becoming insolvent.

The bill was filed to reach the wagon and mules upon an assumed lien of the creditors upon the property, as firm property, and on the ground that the property was transferred to E. D. Staley fraudulently, and with a view to insolvency. The fraudulent intent is denied in the answer, and E. D. Staley claims the property as his own, and that the ownership and possession thereof is protected by the exemption laws. In the case of *Smith v. Edwards*, 7 Humph. 106, and *Croone v. Bivens et al.*, 2 Head, 339, it is held that where one partner retires from a firm, selling out his interest in the assets to the remaining

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partners, who continue the business, and stipulate that they will pay the debts, if they fail to do so, and the retiring partner has them to pay, or becomes liable for them, he has no lien in equity upon the partnership assets for his indemnity. He must rely upon the covenant of the parties.

If the partners have none in such case, the creditors can have none. This is not precisely that case, but we think, in this kind of case, the creditors can have no remedy against the property in question, upon the theory of an equitable lien; but the case stands upon the same footing with a transfer of property by any other person indebted. If fraudulent creditors of the firm may reach it in the ordinary mode.

We can see no evidence of fraud in this case, and this disposes of the case made in the bill. The complainants are not entitled to satisfaction out of the property in question.

Reverse the decree and dismiss the bill.

Reversed.

HICKS V. RANDOLPH.

(8 Bart. 362.)

Suretyship for one non sui juris.

A surety on an obligation void for coverture is liable.*

ACTION against surety on a promissory note. The opinion states the facts.

[No counsel given.]

SNEED, J. The facts agreed in this case are, that the defendant Nannie Moore became surety on the promissory note of Mrs. Randolph, with a full knowledge that the latter was, at the time, a *feme covert*, and it is insisted that the said Nannie Moore is not bound, because as to the married woman the contract is void, and the obligation of the surety falls with it. It is true, that such a contract, as this on the part of a married woman, is absolutely void, but it does not follow that the contract of one who signs the

* See, to same effect, *Davis v. Statts* (43 Ind. 108), 18 Am. Rep. 393.

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note as her surety is also void. On the contrary, the law holds it to be an independent and binding obligation, and recognizes such a case as a special exception to the ancient rule, that the discharge of a principal releases a surety. The case of *Maggs v. Ames*, 4 Bing. 470, does not sustain the plaintiff's position. In that case the question was, whether the undertaking of the defendant was an original one, so as not to require it to be in writing. The court held that it was collateral, and should have been in writing. But neither the counsel nor the court supposed that the defendant would not have been bound if the contract had been in writing. *Keeniel v. Newell*, 7 Hill, 118. In that case A executed a covenant, by which he undertook to become surety for the faithful performance of B's covenant to pay rent, and it was held that A's covenant was binding and valid, though the covenant of B was void for coverture. And so in *Jones v. Crosthwaite et al.*, 17 Iowa, 393, it was held, upon full review, that the general rule, that a discharge of the principal releases the surety, does not apply where a person, *sui juris*, guarantees the obligation of, or becomes surety for, a married woman, minor or other person incapable of contracting. *Et vid. Allen v. Berryhill*, 27 Iowa, 531; 1 Am. Rep. 309; 2 Rich. 590; 1 Parsons on Notes and Bills, 214; Chitty on Contracts, 449. We hold that the defendant, Nannie Moore, is bound by her obligation. The circuit judge held otherwise.

Reverse the judgment and enter judgment here.

Judgment reversed.

MURPHY V. SOUTHERN LIFE INSURANCE COMPANY.

(3 BART. 440.)

*Insurance — local agent — power to waive condition.**

A policy of insurance provided that it should be void unless the annual premium was paid on or before the day appointed. Part of a premium had been paid to a local agent, to whom the duty of collecting the premiums was intrusted, and he, in excess of his limited powers, had given time for the payment of the balance. *Held*, that the policy was not avoided.

SUIT on an insurance policy. The opinion states the facts.

* See *Bodine v. Exchange Fire Ins. Co.* (51 N. Y. 117), 10 Am. Rep. 556; *Dayton Ins. Co. v. Kelly* (24 Ohio St. 345), 15 Am. Rep. 612.

Murphy v. Southern Life Insurance Company.

N. & E. Baxter, for the Company.

Alexander Campbell, for Murphy.

NICHOLSON, C. J. This case was determined in the Chancery Court, at Nashville, upon an agreed state of facts made up in pursuance of the statute. The question involved is, whether the insurance company is responsible to complainant for the amount of a policy issued to Barney Murphy on the 11th of March, 1867. The policy was issued, insuring the life of Barney Murphy for the use of his wife, Dora, and children, in the amount of \$1,000, for the term of his natural life.

It is expressed in the face of the policy, that it was issued in consideration "of the sum of \$24.72, to them in hand paid by Dora Murphy, wife of Barney Murphy, and of the sum of ——— dollars and ——— cents, to be paid on or before the ——— day of ——— next, and note at twelve months from the date thereof, for \$16.48, with interest paid in advance, and of the annual premium \$41.20, to be paid on or before the 11th of March (or half, or quarter yearly, in advance, with interest) two-fifths of said note paid, as aforesaid, in every year, during the continuance of this policy."

It is also recited in the policy, that "it is also understood and agreed by the assured to be the true intent and meaning hereof, that, in case the said premium shall not be paid on or before the day hereinbefore mentioned for the payment thereof, then, in any such case, the said company shall not be liable for the payment of the sum assured, or any part thereof; and this policy shall cease and determine. And it is further agreed, that, in every case where the policy shall cease, or become, or be, null and void, all previous payments made thereon shall be forfeited to the said company."

The facts agreed on are as follows: Barney Murphy died on the 25th of January, 1870. The premium for the first and second years of the policy was duly paid, but for the third year, when the assured died, it had not all been paid, but paid only in part, to wit: \$11. This sum was paid to W. Matt Brown, who, at the time, was the local agent of the company at Nashville, where the policy was issued, and where Murphy lived and died. Brown, from time to time, called upon Murphy to pay the balance of the premium, but he failed to do it. It is agreed that Brown did not pay the \$11

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over to the company, but this was unknown to Murphy; also, that at the time of the payment of the \$11, he told Murphy that if he did not pay the balance, the policy would be forfeited. It was further agreed, that a circular, issued by the company in 1868, was received by Murphy, and that Brown gave Murphy a receipt for the \$11. This receipt, however, is not in the record, nor is there any proof as to its date or its terms. In the circular referred to, dated, "Office Southern Life Insurance Company, Memphis, Tennessee, ———, 1868," the following passages occur:

"Persons who wish to guard against the contingencies to which all are liable, by getting a policy of insurance, are referred to the agent of the company, if one has been appointed in your neighborhood."

"All policies non-forfeited after the second annual payment."

It may be inferred from a notice exhibited in the agreed state of facts, that it was the habit of the company to issue from its office at Memphis a notice to each person assured, notifying him, in advance, of the amount of cash premium, and when to be paid, and the amount of the premium note.

It appears, further, from another exhibit, that the office at Memphis prepared receipts, stating the amount received from the assured for premium on policy, giving its number and amount insured to the end of the next year. These receipts were sent to the local agents in advance of the day for payment, regularly signed by the secretary at Memphis, as of the date of the payment, but with this condition annexed: "Not binding until the amount is paid on this receipt, countersigned by W. Matt Brown. agent at Nashville."

These were all the facts submitted to the chancellor. He was of opinion that complainant was not entitled to recover, and decreed accordingly. From this decree complainant has appealed.

The first inquiry that presents itself is, how did Brown and Murphy understand the transaction between them, when Murphy paid and Brown received the \$11? It does not appear when this transaction occurred, but we may safely assume that it was either on the 11th of March, 1869, when the premium was payable, or after that time.

When the payment of \$11 was made and receipted for, Brown told Murphy that "if he did not pay the balance, the policy would be forfeited." It is clear that Brown did not consider the policy

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already forfeited, but his understanding was, that, whether it would or would not be forfeited, depended upon the future payment of the balance of the premium. That this was his understanding, is made clearer by the fact that, from time to time, afterward, he called upon Murphy for the balance. The understanding, then, of Brown and Murphy was, that Brown had a right to keep the policy alive after the 11th of March, 1868, by accepting \$11 of the premium, and collecting the balance afterward. In other words, the transaction shows that Brown understood himself as having the right to waive the forfeiture arising from non-payment of the premium, by receiving payment of a part and making the forfeiture depend upon the payment or non-payment of the balance of the premium. Hence we see that Brown, regarding the question of forfeiture as superseded, retained the \$11, but made no return of it to the office at Memphis, and no report of the transaction, so far as we can see, but from time to time, demanded of Murphy the balance. Before the expiration of the year Murphy died. Upon this view of the transaction between Brown and Murphy, the next inquiry is, was Brown authorized to waive the forfeiture, and by so doing, to bind the company upon the policy? The character and extent of Brown's agency is necessarily involved in this inquiry.

We have been furnished with the written opinion of the chancellor in the case, and we find that he considered the case of *Bouton v. The American Mut. Life Ins. Co.*, 25 Conn. 342, as conclusive of the question in this case. The case of *Bouton v. The American Mut. Life Ins. Co.* was an action at law, determined in 1857. The policy sued on was, in its main features, similar to that in the case before us, except that the *testimonium* clause was as follows: "In witness whereof, the said American Mutual Life Insurance Company have, by their president and secretary, signed this contract, this 25th of February, 1851, but the same shall not be binding until countersigned by W. W. Webb, agent, and delivered, and the advance premium paid." The advance premium was payable on the first of July, 1852, but was not paid until after that time. It was paid to W. W. Webb. The court below had instructed the jury, that, if the premium was paid to and received by Webb, as the agent of the defendants, in good faith, though the sum was paid after the 1st of January, 1852, they would find for plaintiff. *STORRS*, C.J., delivered the opinion of the Supreme Court. After

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laying down the doctrine, that, where policies of insurance contained a provision that if the advance was not paid on the day designated, the policy should be forfeited, as the provision was inserted for the benefit of the insurers, it was only void at their election, and, therefore, that they might waive a strict compliance with it, after the time stipulated for the payment of the premium, or the reception by them, or their authorized agent, of the premium for that purpose, after that time, would have the effect of reviving and continuing the contract, evidenced by the policy, as though it had been strictly complied with by the assured, the chief justice proceeded to the question, whether Webb had authority, after the 1st of January, 1852, to receive payment so as to bind the company. He said that the only authority which Webb had was contained in the *testimonium* clause of the policy, that clause being that the contract "shall not be binding until countersigned by W. W. Webb, agent, and delivered, and the advance premium paid." The word "agent," added to Webb's name, considered with reference only to the said clause, imports no more than that he was the agent of the defendants, to do and co-operate in the things which it was therein provided should be done for the purpose therein mentioned, of making the contract binding. One of those things was the payment, by the insured, of the premium in advance to, and consequently its reception by, him. The question now is, as to the extent of the authority which was thus conferred on Webb, in regard to the premium provided for in the contract. We think he was not empowered to receive any premium which was not paid according to the requirements of the policy, that is, in advance. That instrument was his sole guide in regard to what he should do under it." He concludes: "Our opinion is confined to the question as to the character and extent of Webb's authority, as deducible from the terms of the policy itself; leaving the plaintiff at liberty to prove expressly by extrinsic evidence, an authority to receive premiums after the time when they were made payable by the terms of the contract, so as to revive it, or facts from which such an authority should be implied."

It thus appears that the court held that Webb was only a special agent for the purpose of countersigning the policy and receiving the payment of the premium in that case; and this conclusion was based upon the fact that he was simply designated "agent" for these purposes, with no other evidence than this as to his agency.

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But it is conceded, in the opinion of the court, that if there was proof of facts from which an authority to receive premiums after the time they were made payable might be implied, then the forfeiture would be waived.

It is apparent that the Connecticut case differs from the case at bar in this, that in the former Webb was agent for the single purpose of receiving the advance premium in that particular case, and of countersigning the policy, but in the case before us the policy was not to be binding until the advance premium was paid to and the receipt countersigned by Brown, "agent at Nashville." This language indicates clearly that Brown was "agent at Nashville," and in the agreed facts it is stated that he was "local agent at Nashville." He was, therefore, not only agent in the particular transaction of receiving the advance premium from Murphy, and countersigning the receipt for the money, but he was the local agent of the insurance company at Nashville, to receive advance premiums and countersign certificates as well as to do all other things properly belonging to the position of a local agent at Nashville.

It follows that the Connecticut case is not a controlling authority in the present case; but in this case the question depends, first, upon the extent of Brown's authority as a local agent to waive the payment of the premium in advance, and, second, upon the legal consequence of Brown's acceptance of part of the premium, and giving time to Murphy for the balance.

1. The main embarrassment in the case arises from the fact that there is nothing in the record defining with clearness the character of Brown's agency or the extent of his powers. There is enough to show that the principal office was located at Memphis, and that the contracts for insurance were there consummated by the execution of the policies, but that the delivery of the policies and the receipt of the premiums, and the countersigning thereof, previous to the delivery, were at least parts of the business of Brown, as agent at Nashville.

We think it may be fairly inferred that, in addition to these powers, Brown was to receive application for insurance, to take the preparatory steps for forwarding the applications to the principal office, there to be acted on and consummated, as already stated. The term "local agent" conveys no other meaning than that of an agent at a particular place or locality; but whether such an

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agent has general or limited powers is not determined by simply calling him a "local agent."

In *Bliss on Life Insurance*, § 277, it is said, "the agents of life insurance are scattered throughout the States in thousands. There are not only local agents appointed in nearly every city and village, but also so-called general agents who have charge of an entire State or district, and whose actual powers are usually much greater than those of the local agents. The actual powers of such agents, both general and local, may be very different from their apparent powers, and it is therefore essential to remember that so long as the agent acts within the apparent scope of his authority the company is bound by his acts, though they may be in excess of, or in violation of his real powers. An agent is, moreover, conclusively presumed to have not only the usual and ordinary powers of an agent engaged in the business for which he is appointed, but all the powers necessary and convenient in the execution of his authority." *Marky v. Mutual Benefit Life Ins. Co.*, 103 Mass. 78; *Story on Agency*, §§ 58 and 106.

It was said in the *Massachusetts* case, just cited, that the authority of an agent must be determined by the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private or undisclosed instructions, unless there is something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers. "A special agent," says Mr. Story, § 58, "properly exists where there is a delegation of authority to a single act; a general agency properly exists when there is a delegation to do all acts connected with a particular trade, business or employment." "Under this definition," says Mr. Bliss, page 439, "the agents of insurance companies, who are scattered over the country (local agents), would seem to be general agents, but not general agents to do all acts connected with procuring applications for insurance."

If we test the extent of Brown's powers as agent at Nashville, by the rules laid down in these authorities, we must hold that he had all the powers necessary and convenient for the execution of his authority, and that the extent of his powers must be determined by the nature of his business and the apparent scope of his employment therein. It was part, at least, of his business as agent, to receive premiums from persons having policies, for the purpose

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of continuing those policies from year to year; to receive such premiums even after the expiration of a year, and when the policies, by their terms, had determined and ceased, would be within the apparent scope of his employment; and, therefore, that the company was bound by his acceptance of a partial payment after the time when the premium was payable.

2. In *Flanders on Fire Insurance*, 104, it is said, that "the general tending of the cases is, that the officers and agents of insurance companies may waive the usual condition that the premium must be paid before the policy shall be effectual, as well as any other condition in the contract intended for their benefit, and if the assured is allowed to act upon the confidence of such waiver, the insurer is estopped to deny the fulfillment of the condition." (A long list of cases is cited as sustaining this proposition.)

Mr. Bliss, in his work on *Life Insurance*, p. 465, says: "There is a distinction between the powers of an agent after a policy has been issued, and before. He may well be held to have authority to bind the company in connection with matters transpiring before or at the time of the issuance of the policy, and relating to it, but after the policy had been issued, his powers, as a general thing, are, so far as that policy is concerned, exhausted, unless he has the power to make a new contract. An agent, without authority to contract, has authority to waive payment of the premium, and to deliver the policy, giving a credit for the amount, though the policy provides that no policy shall be binding till the premium is paid, and this, even though the policy also provides that the agent has no power to waive any condition on it." This proposition is supported by reference to several late New York cases, which are in the list referred to by Mr. Flanders.

Among the cases so cited is that of the *Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305. Judge Comstock said: "In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol, and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand or at a future day." In the conditions annexed, and forming a part of the contract in that case, it was set forth that no issuance, whether original or continued, should be considered as binding until the actual payment of the premiums.

Another one of the cases cited was that of *Goit v. National Protection Insurance Co.*, 25 Barb. 180. In that case it was held to be

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"the privilege of the insurers, if they elected so to do, to waive the condition making the actual payment of the premium a condition precedent to the binding efficacy of any insurance, as it was a provision inserted for their benefit, and in which they alone were interested. This waiver may be established by evidence of an express waiver, or by circumstances from which such waiver may be inferred, and it may be by the managers of the company, or by a duly authorized agent, and as it was done by the latter in this case, it was obligatory on the company."

These authorities, as well as others referred to, sustain the positions laid down by Flanders and Bliss, already quoted. It follows, that although Brown was acting in excess of his limited powers, and in violation of his special instructions, as indicated in the receipts prepared and sent to him when he received \$11 from Murphy, and gave him the receipt therefor as part payment of his premium, giving time to pay the balance, yet, as he was then acting within the apparent scope of his employment as agent of the company, his action amounted to a waiver of the condition of prepayment of the premium, and was binding on the company.

We are, therefore, of opinion that the decree of the chancellor was erroneous, and the same is reversed, with costs to this court and the court below.

FRENCH V. IRWIN.

(4 Baxt. 401.)

Certified check — action against drawer.

A bank is liable on a check certified by it, whether the drawer had sufficient funds are not.

Where the holder of a check procures it to be certified, this operates as payment of the debt for which the check was drawn, and the drawer is released from liability.*

ACTION on check. The opinion states the facts.

Demoss and Malone, for Irwin.

Baxter Smith and Neil S. Brown, for French.

* See *acc. First Nat. Bank v. Leach* (52 N. Y. 350), 11 Am. Rep. 708; but see *Andrews v. German Nat. Bank* (9 Betts, 311), 24 Am. Rep. 360.

FREEMAN, J. On the 13th of February, 1862, Irwin & McCaw drew their checks on the Bank of Tennessee, at Nashville, for \$1,600, which were delivered to plaintiffs in payment for a lot of sugar purchased about that time. Within a few days after, perhaps on the 17th or 18th, the checks were presented to the bank, and the word "good," signed by A. Cunningham, clerk, written across the face of them. About this time the bank was removed South, on the approach of the Federal army, and was not brought back until about May, 1860. The checks were again presented in 1866, payment refused, the bank then being insolvent, and having ceased entirely to do a regular business.

It is shown by the cashier of the bank, that the clerk, Cunningham, was authorized to certify the checks, and to bind the bank by so doing. These facts raise the question as to what was the effect of thus certifying the check by the bank.

The rule of law is thus laid down by the Court of Appeals of New York: "The certification of a check, if written out, would contain a statement that the drawer had funds sufficient to meet it in the bank, applicable to its payment, and an agreement on behalf of the bank, that those funds should be retained and paid upon the check whenever it may be presented." *Cooke v. State N. Bank of Boston*, 52 N. Y. 96; 11 Am. Rep. 697. And whether a check when presented is paid by the officer of the bank in money, or he gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit, the officer is acting within the line of his duty, and the bank bound. In another case, *First Nat. Bk. of Jersey City v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708, the same court say, "the theory of the law is, that, where a check is certified to be good by a bank, the amount thereof is then charged to the account of the bank certificate account. Every well-regulated bank adopts this practice to protect itself." If the bank fail to do this, however, it might involve itself in peril by failure of its customers, whose checks were certified without any account of their number or amount, but it would still be liable to pay its certified checks, whether it had funds or not. See *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. 125.

When the holder of the check presents it, it is his own fault if he fails to receive the money. If he takes the certificate of the bank, that the check is "good," instead of the money, it is his own

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contract, for which the drawer is in no wise responsible, and the holder must take all the risk and responsibility of his own act. If he is unwilling to take certified checks instead of the money, it is easy for him to refuse to do so, and go on the drawer for his money. We think, both on principle and all modern authority, the court below charged correctly, that plaintiff, by having the checks certified, thereby made them their own, and held them at their own risk, and could not, after this, recover, either on the check or original consideration.

Other minor questions have been stated in argument, but this is conclusive of the case, and we need not notice them.

Let the judgment be affirmed.

Judgment affirmed.

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(1 Lea. 380.)

Surety — effect on, of usurious agreement for delay between principal and creditor.

A surety is not discharged by an executed usurious agreement for delay, between the principal debtor and the creditor, although made without the surety's knowledge or assent.*

ACTION upon a promissory note. The opinion states the facts.

Ingersoll, for Howell.

Pettibone & Robinson, for Sevier.

McFARLAND, J. Action upon a note executed by W. F. Gleason and C. L. Sevier to Daniel Howell, \$230, due at four months. Sevier was the surety of Gleason, and claims to be discharged upon the ground that, after the note fell due, Marshall, to whom it had been transferred, agreed with Gleason to extend the time four months longer in consideration of the payment by Gleason of thirty dollars in addition to the principal and interest of the note. The cause was submitted to the circuit judge without the intervention

* See *Oberndorf v. Union Bank of Baltimore* (31 Md. 126), 1 Am. Rep. 31.

of a jury, and judgment rendered in favor of the defendant Sevier, and the plaintiff has appealed.

It appears that the agreement alleged was entered into between Marshall and Gleason after the note fell due, and without the knowledge or assent of Sevier. The agreement was that four months' additional time was to be granted upon the note in consideration of a *bonus* of thirty dollars to be paid by Gleason, who gave his due-bill for this sum, and paid the same two or three weeks afterward.

Do these facts discharge the surety? It is well settled that the agreement between the creditor and principal debtor for delay which will discharge the surety must be a valid and binding agreement, and one which presents a legal obstacle, for the time, to the prosecution of an action upon the original security. It was held by this court in *Wilson v. Langford*, 5 Humph. 320, that a stipulation for delay based upon the contract of the debtor, and evidenced by his separate note to pay a further sum in addition to the principal and lawful interest of the original debt, was not a valid contract for delay and the surety was not thereby discharged; that the agreement to pay usurious interest was unlawful and void, and the contract, therefore, not binding upon either party. The only difference between that and the present case is, that in the case referred to the usurious interest had not been in fact paid, but only a note given for its payment. In the present case the note given for the usurious interest was afterward, and within the time of the additional delay agreed upon, paid by the debtor. Does this constitute an exception to the general rule stated in *Wilson v. Langford*, *supra*? Does the actual payment of the usurious interest render the agreement for delay obligatory upon the creditor? It has been so held in a number of cases, upon the ground that the right to set up the illegality of a usurious payment in avoidance of the contract for delay belongs to the party making the payment, and not to those by whom it is received. See 3 Lead. Cas. in Eq. 566. But this, says the same authority, has been questioned, and is not applicable unless the interest be paid in advance, or during the time of the delay agreed upon. See also, 2 Am. Lead. Cas. 471. The test is, could the agreement for delay have been enforced against the creditor, either as a defense to the suit or as a cause of action? If so, the surety will be discharged, otherwise not. In *Vilus v. Jones*, 1 Comst. 286, two of the judges hold that

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the payment of usurious interest did not validate the agreement for delay ; that whether paid or agreed to be paid, it was the same. The reasoning is very persuasive. The other judges concurred probably upon the ground that the surety sought this relief after judgments at law.

We have not access to the authorities referred to upon the question. It can readily be admitted that a payment of any sum before either principal or interest of the original debt became due, might well support an agreement for delay. Such payment, if made as usury, could be regarded as a payment upon the debt lawfully due, made in advance of the time when the same could be rightfully demanded, and it would, therefore, support a new agreement. The proposition, that an agreement for delay in consideration of the debtor's promise to pay an additional sum as usurious interest, will be valid, provided the debtor pay the usury within the time of delay agreed upon, cannot be received without qualification. The delay agreed upon in this case was four months. The debtor gave his note for thirty dollars usury. He might have paid this on the last day of the four months. The agreement for delay was not valid until the payment of the money, and in such case it would become valid at the same time the delay had expired. We are of opinion that under our law the payment in such a case must be regarded and held as a payment upon the debt lawfully due, notwithstanding the agreement of the parties to the contrary, and, therefore, such payment will not support an agreement for delay. The payment of the money is as unlawful as the agreement to pay. If paid, unless appropriated to the lawful debt, it may be recovered back either by the debtor or a judgment creditor of his. The argument, that the debtor paying the usury does not repudiate the contract, is not sound. The debtor might fail to repudiate the contract, and insist upon the delay agreed upon ; this, if enforced, would discharge the surety, but a creditor of the debtor might afterward recover the usury from the creditor receiving it. So that he would have been compelled to stand by his contract, and yet lose the consideration. In short, the creditor cannot lawfully enforce the promise of his debtor to pay usury, nor can he lawfully retain the money if paid, except as a payment upon the lawful debt, and therefore his agreement for delay founded upon such a consideration is not obligatory upon him.

Judgment reversed and judgment rendered here for the plaintiffs, allowing the credit of thirty dollars. *Judgment reversed.*

GOSLING v. CALDWELL.

(1 Lea. 454.)

Life insurance — assignability.

A policy of insurance procured by one on his own life and payable to his heirs is not assignable by him.*

A AGREED case to test rights in a life insurance. The opinion states the facts.

E. Cooper, for complainant.

Warder, for defendant.

COOPER, J. By a policy of insurance on his own life, taken out by William Gosling, the insurance company promised to pay the amount assured, within sixty days after his death, "to the legal heirs of the said William Gosling." Afterward, on the 13th of September, 1875, Gosling, by a separate instrument and delivery of the policy, transferred to Thomas H. Caldwell a trust for the indemnity of himself and others as sureties for Gosling. Gosling has since died, leaving a widow, three children, and two grandchildren, the children of a son who died before him. The question submitted by the agreed case is, whether the grandchildren for whom complainant is guardian are entitled to any, and what share of the fund due upon the policy which was paid by the company to Caldwell by agreement of parties. The other children have, it seems, released their interest to the trustee.

By the act of 1846, ch. 216, § 3, brought into the Code as §§ 2294 and 2478, a husband was authorized to effect a policy of insurance on his life, which should inure to the benefit of his widow and heirs, to be divided between them according to the law of distribution, free from the claims of creditors. It was made a point under these provisions, whether the husband, who had taken out an ordinary policy of insurance on his life, payable to himself or personal representative, could assign the same for the benefit of

* See *Missouri Valley Life Ins. Co. v. Sturges* (18 Kans. 86), 56 Am. Rep. 761.

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creditors, or make a disposition thereof by will, so as to deprive the wife and children of a benefit under the statute. But it was properly held that statute was not intended to deprive the husband of the power of disposition incident to the ownership of the policy, and was designed simply to exclude the claims of creditors in case of intestacy, the amount assured being part of the assets of the estate. *Rison v. Wilkerson*, 3 Sneed, 565; *Williams v. Corson*, 2 Tenn. Ch. 269, affirmed on appeal. It was strongly intimated in the first of these cases that if the policy had been made payable to the widow and heirs, the proceeds could not have been diverted from them, and the authorities are uniform to this effect. *Gould v. Emerson*, 99 Mass. 154; *Eadie v. Slimmon*, 26 N. Y. 9; *Conn. Mut Life Ins. Co. v. Burroughs*, 34 Conn. 305; *Ruppert v. Union Mut. Ins. Co.*, 7 Robt. 155; *Frat. Mut. Life Ins. Co. v. Applegate*, 7 Ohio St. 292. The principle which underlies these decisions is, that when the policy is issued the rights are vested, and cannot be divested without the consent of those to whom they are secured. The same rule applies where the policy issued to the party himself has been assigned by an executed contract, though voluntary. *Fortescue v. Barnett*, 2 M. & K. 36; *Harrison v. McCarskey*, 2 Md. Ch. 34; *McCoy v. Noyes*, 3 Bradf. 139.

The word "heirs," it is well settled, is flexible, and in the case of personalty means next kin. *Vaux v. Henderson*, J. & W. 388. note; *Ward v. Saunders*, 3 Sneed, 387.

The chancellor's decree, giving one-fifth of the fund to the grandchildren, must be affirmed.

Decree affirmed.

 LEWIS V. HUBBARD.

(1 Lea. 436.)

Warranty — condition precedent.

Upon a sale of a machine, with written warranty, and a provision that in case of failure of the machine to answer the purpose, the warrantors were to have notice "at once," in order that they might cause it to work well, or furnish another that would work well. Such notice is a condition precedent to an action for breach of the warranty.

ACTION on a promissory note. The opinion states the facts.

Cornick & Cornick, for Lewis & Jackson.

O. C. King, for Hubbard.

McFARLAND, J. This suit was commenced before a justice of the peace upon a note executed for the purchase of a threshing machine. The verdict and judgment in the Circuit Court were for the defendants.

The machine was sold by Lewis & Jackson, the agents of H. G. Mead, who was the agent of the manufacturers. The warranty was in writing and as follows:

"Our machines are fully guaranteed to do superior work, as represented in our catalogue; to be made of good material, and durable, with proper care. If the machine does not bear the guarantee (after reasonable trial) we are to be notified of the same at once, and if we fail to make the machine work well, or do not furnish another that will answer the guaranty, it may be returned."

The sale was made about the 13th of July, 1873, and the machine delivered about that time. The note sued upon was of that date, and due at four months, for the first payment on the machine. Suit was brought upon the note the 28th of May, 1874, and judgment rendered by the justice, without objection, on the 3d of July, 1874, and execution stayed; but, on the 31st of December, 1874, the cause was taken up to the Circuit Court by *certiorari*.

In order to excuse this delay, the defendants and their witnesses testified that they threshed with the machine during the year 1873, that it was defective and did not do good work, but they thought at the time that it might be owing to the fact that the horses used were too light. Hubbard, one of the defendants, testifies that in the winter of 1873-4 he met Mead and told him of the defects of the machine, but proposed to keep it and try it during the threshing season of 1874, inasmuch as he supposed the defect might be in the horses, and that Mead agreed to this. Hubbard proves that the same conversation and agreement was had with Jackson, one of the firm of Lewis and Jackson. This testimony is denied by both Mead and Jackson, but we must take it that the jury has found for the defendant upon this question. The defendants further testify that they tested the machine again in the year 1874,

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and that it proved a worse failure than before, and that it is worthless; but there is no proof that after the trial of the machine in the year 1874 there was any notice to the plaintiffs or offer to return it, but the same is still in the possession of the defendants.

As correctly charged by the circuit judge, both parties are bound by the terms of the written guaranty. One of the stipulations was, that "if the machine does not bear the guaranty (after reasonable trial), we are to be notified of the same *at once*, and if we fail to make the machine work well, or do not furnish another that will answer the guaranty, it may be returned." The plaintiffs must be held to make good their warranty in the manner and upon the terms they agreed to do so. That is, if the machine did not give satisfaction they were to be *notified at once*, and they were then to have the privilege of remedying any defect so as to make the machine in accordance with their guarantee, or to furnish another machine, and if they failed to do this the machine sold might be returned. One of the defendants testifies that he did notify the plaintiffs in the winter of 1873-4 that the machine had not done well, and proposed to return it, but that it was agreed that they were to try the machine during another threshing season, as he was not himself certain but that the defect was in the horses used.

The only legitimate effect of this testimony would, at most, be to extend the time for the defendants to test the machine. But for this agreement, they should have tested it within a reasonable time during the year 1873, and, in the language of the contract, notified the plaintiffs "*at once*" if it failed to give satisfaction; but, by the alleged agreement, they were allowed to give it a further trial during the season of 1874. If, upon this further test, the machine still failed to give satisfaction, it was then the duty of the defendants to give the plaintiffs notice at once, to the end that the plaintiffs might then have the opportunity to cure the defect or supply a new machine, in accordance with the contract. But, according to the proof, after making some effort to run the machine in the year 1874, the defendants abandoned it and stored it away, but gave the plaintiffs no further notice and made no further offer to return it.

The circuit judge held that a failure to make an offer to return the machine deprived the defendants of the right to return it, and amounted to an election to keep it at what it was reasonably

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worth ; and in that view, if the proof showed the machine not to be as represented, the defendants were entitled to an abatement to the extent of the difference between the contract price and the actual value of the machine. The jury have estimated this difference at the full price, as they have allowed nothing. The charge would be correct in the case of an ordinary warranty without the special terms in favor of the warrantor found in this case ; but, under the special stipulations referred to, the defendants had not the right to abandon the machine without notice to the plaintiffs, and without giving them an opportunity to cure the defect or supply another machine, and at the same time require them to make good the entire price, although the defendants testify that the machine is worthless, for all we know the plaintiffs might have cured the defect, or at least made it valuable to themselves, if they had had the opportunity.

We think the case was not submitted under a proper charge, and beside, the testimony does not support a verdict for the defendants.

The judgment will be reversed and a new trial awarded.

 SNYDER V. SUMMERS.

(1 Lea. 534.)

Assumption by grantee of lien on premises.

A owned land under a deed on its face subject to a lien for unpaid purchase-money. He conveyed to B an undivided fourth interest thereof, with warranty, B assuming in consideration thereof to pay one-fourth of the lien debt. By agreement between A and his grantors, the amount of the lien debt was reduced to a sum less than that due from B, no part of which had been paid, and the land was sold to satisfy the lien. *Held*, that B was not entitled to any recovery on the warranty ; that he was entitled to share in the reduction of the lien debt, and liable to A for one-fourth thereof as reduced.*

BILL in equity. The opinion states the facts.

Ed. Cooper, for complainant.

Wisener & Son, for complainant.

* See *Fiske v. Tolman* (124 Mass. 254), 26 Am. Rep. 652, and note, 650.

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COOPER, J. On the 7th of September, 1861, the complainant, James S. Snyder, bought from the Union Bank, at the price of \$25,000, certain lots in the city of Chattanooga, on which were situated a mill and distillery, and known as the Bell property. He paid (\$5,000) five thousand dollars down, and executed notes, at four and five years, with interest from date, for the residue of the purchase-money. The bank conveyed to him the land by deed in fee, retaining a lien for the unpaid purchase-money. Snyder sold an undivided one-fourth interest in this property to William Snyder, an undivided eighth to Haldeman, and another eighth to Bruce. On the 14th of February, 1863, he sold and conveyed to the defendant, W. W. Summers, by deed in fee with covenants of warranty, one undivided fourth of said property for \$7,500 in Confederate money then paid, and the assumption by Summers of the payment of one-fourth of the unpaid debt to the Union Bank. At the time, and as part of the transaction, he took the obligation of Summers in the penalty of \$10,000, conditioned for the payment of "said one-fourth of his said liability to said bank, say five thousand dollars, with all the interest and damages." The recitals of this instrument, upon which the defendant's undertaking is made to rest, and embodied in the condition, are as follows: "The said Snyder is indebted in these premises by his several notes to the Union Bank of Tennessee, in the sum of twenty thousand dollars, one-fourth of which, say five thousand dollars, I (W. W. Summers) assume to pay, with all the interest and damages that may accrue thereon, he having transferred to me, in consideration of said assumption, and \$7,500 to him paid, an undivided one-fourth interest in his steam flouring mill and distillery, and brick rectifying house, known as the Bell property, in Chattanooga, Tennessee, with all the rights and privileges unto them belonging, or to said one-fourth interest appertaining, as shown more fully by his deed to me of even date herewith."

The defendant, Summers, went into possession of the property bought at once, receiving the rents, issues, and profits of the business to the extent of his one-fourth share. The business of the mill and distillery was at the time profitable, the net proceeds being shared by the joint-owners and partners as they were earned, and so continued until Chattanooga was occupied by the Federal armies. During their occupation the buildings on the land were destroyed. After the war the Union Bank filed a bill against Snyder

and others, to which Summers was no party, to enforce its lien for the unpaid purchase-money, no part of which had been paid by Summers. By the same bill the bank attached other property of Snyder in order to cover any balance of debt after exhausting the land on which the lien had been retained. Pending this suit, on the 22d of July, 1869, the bank entered into a written agreement with Snyder, by which it agreed to take the Bell property, and all of the individual property of Snyder, which had been attached, except one lot, in satisfaction of the unpaid purchase-money, with the further stipulation that if Snyder would pay \$5,000 the bank would receive it in full for its debt. On the 29th of July, 1869, the bank took a decree, subject to this agreement, for \$14,740, the balance then due, including interest, of the original debt of \$20,000, and an order for the sale of the Bell property, and other property surrendered to it by Snyder. The agreement with the bank was communicated by Snyder to Summers, and the latter promised to aid in raising the means to pay the \$5,000 agreed to be received in satisfaction of the entire bank debt. The time of payment seems to have been extended at his request. Nothing was, however, done in the matter. On the 30th of November, 1869, the order of sale in favor of the bank was executed, and the sales were confirmed on the 25th of January, 1870. The Bell property sold for about \$3,000, its value at the time. The individual property of Snyder brought in addition about \$2,000. On the 3d of October, 1870, Snyder filed his original bill in this cause to hold Summers liable in his obligation of the 14th of February, 1863, jurisdiction being given to the Chancery Court by a conveyance of his property to one of his co-defendants to hinder and delay creditors. The defendant answered and filed a cross-bill, claiming that his obligation should have been only for \$2,500 instead of \$5,000 and that it had been paid by him. He also insisted that upon a partnership account Snyder would be brought in debt to him. These defenses not being made out, as they clearly are not, Summers, on the 8th of March, 1873, filed an amended cross-bill, in which he relies upon the failure of consideration to him by the sale of the Bell property under the bank lien, and asks a recovery of the complainant's warranty of title in his deed of conveyance of the one-fourth interest. Such proceedings were had that on the 16th of September, 1874, a final decree was rendered in favor of Snyder

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against Summers for the sum of \$2,273.87, being \$1,728.93 as of the date of the sale by the bank with interest. The latter appealed.

The evidence in this cause renders it certain that the profits of the mills and distillery property, and the proceeds of the sale of stock on hand and saved when the Federal army entered Chattanooga, were so divided between the co-owners and partners that neither could demand an account, and that account would be of no advantage to the defendant. It is equally certain that he never paid either to the Union Bank or to the complainant any portion of the purchase-money of the Bell property. The litigation turns, therefore, on the relative rights of the parties under the deed and obligation of the 14th of February, 1863. By his deed of that date, Snyder conveyed one undivided fourth of the Bell property to Summers in fee, with covenant of warranty. By his obligation of the same date, Summers undertook, in part consideration of the purchase, to pay his share (one-fourth) of the bank debt, which was a lien on the property. The substance of the transaction then is, that the vendor, the owner of the property subject to a lien or mortgage in favor of the bank, sells a part of the property to the vendee, in consideration of the latter, as part of the purchase-money, paying one-fourth of the prior lien. The rights of parties under such circumstances are well settled.

Independently of contract, whenever a mortgage debt forms a part of the consideration of purchase, equity has always implied a promise on the part of the vendee to indemnify the vendor against the personal obligation to pay the mortgage money; for having become owner of the estate, he must be supposed to intend such indemnity. *Tweddell v. Tweddell*, 2 Bro. C. C. 152; *Naring v. Ward*, 7 Ves. 337; *Champion v. Brown*, 6 Johns. Ch. 409; *Tichenor v. Dodd*, 3 Green's Ch. 454. Of course a positive promise fixes the liability beyond question, and establishes between the parties the relation of principal and surety. It has been repeatedly determined that where a person buys land absolutely for a stipulated price, and, instead of paying the whole of it to the grantor, is allowed to retain a part, which he agrees to pay to a creditor of the grantor having a lien upon the land, the amount which he thus agreed to pay is his own debt, and although the arrangement does not discharge the grantor from liability to the lien creditor, who is no party to it, yet, as between the grantor and the grantee who has thus assumed the debt, the grantor is a mere surety.

Marsh v. Pike, 1 Sandf. Ch. 210; s. c., on appeal, 10 Paige, 595; *Garnsey v. Rogers*, 47 N. Y. 239; 7 Am. Rep. 440; *Corbett v. Waterman*, 11 Iowa, 86; *Hebert v. Doussan*, 8 La. Ann. 267. The undertaking of the purchaser to pay the lien debt, even if the undertaking be in parol, would be enforced in equity, and a covenant of warranty in his deed would not estop the complainant, nor would any other of the usual covenants, from recovering on such undertaking. *Bolles v. Beach*, 2 Zab. 680; *Wilson v. King*, 8 C. E. Green, 150; *Bowen v. Kurtz*, 37 Iowa, 239. And a *fortiori* if the promise be by an obligation of equal dignity with the deed containing the warranty. *Drury v. Tremont Improvement Co.*, 13 Allen, 168; *Colgin v. Henley*, 6 Leigh, 85; *Brown v. Staples*, 28 Me. 497; *Watts v. Wellman*, 2 N. H. 458; *Morgan v. Smith*, 11 Ill. 201. A stipulation by which a purchaser "assumes and agrees to pay" a mortgage has been held to be a contract not merely to indemnify the grantor, but to pay the debt, and sufficient to sustain an action by the promisee, without first having paid the debt. *Furnis v. Durgin*, 119 Mass. 500; 20 Am. Rep. 341; *Rubens v. Prindle*, 44 Barb. 336; *Bowen v. Kurtz*, 37 Iowa, 239. And of course such a promise would sustain an action after payment. *Mills v. Watson*, 1 Sweeny, 374; *Kinnear v. Lowell*, 34 Me. 299. It is not material to the application of these principles that the purchaser should be liable directly to the lien creditor. The weight of authority is that the covenant of the purchaser to the vendor to pay a mortgage is a collateral security which inures to the benefit of the lien creditor only by way of equitable subrogation. *Crowell v. Currier*, 27 N. J. Eq. 152; *Pettes v. Peppard*, 120 Mass. 522. A purchaser of a portion of mortgaged premises, who assumes the payment of a proportionate share of the mortgage debt, is to that extent liable as the purchaser of the whole property. *Torrey v. Bank of Orleans*, 9 Paige, 649; s. c., on appeal, 7 Hill, 260. The measure of damages in an action by the grantor against his grantee, upon his promise to pay a lien debt, is the amount of the debt and interest remaining unpaid. *Furnas v. Durgin*, 119 Mass. 500. The defendant, by his obligation of the 14th of February, 1863, which was of equal dignity as the deed contemporaneously executed, became, to the extent of the \$5,000 assumed, the principal debtor, the complainant becoming as to him only the surety, and if he allowed the land to be sold for that

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part of the debt, it would be his loss. The deed should be read as if the obligation were incorporated in it.

In that view, the warranty of title contained in the deed would be against all claims except the claim of the Union Bank, to the extent of the \$5,000 assumed by the vendee. If, now, the land had been sold in satisfaction of the bank lien, for any part of the debt over and above the \$5,000 assumed, it is clear there would have been a breach of the warranty. While the complainant might have been entitled to recover on the obligation, the defendant would also be entitled to recover on the warranty. The record shows, however, that before any sale the bank relinquished a part of the debt so as to reduce the amount below the sum which the defendant had obligated himself to pay. Legally, therefore, there could be no recovery on the warranty. But in equity the reduction thus gratuitously made by the bank must inure to the benefit of all the co-owners. If the complainant had paid the \$5,000 agreed to be received by the bank—and this was what was substantially done by the sale and surrender of his property—he could only have recovered from the defendant his share of this burden, which would be in the proportion he would have been bound for the balance of the debt had there been no compromise. The whole unpaid balance on the 29th of July, 1869, was \$14,740. Up to the same date the defendant's liability would have been, including interest, \$7,366, almost exactly one-half. Dividing the \$5,000 in that proportion would make the defendant's liability \$2,500, from which must be deducted his share of the sales, \$750. The residue, \$1,750, is so near the sum found by the chancellor, \$1,728.93, that it is not worth while to change the latter.

The decree will be affirmed, leaving the costs below to go as adjudged by the chancellor. The appellants will pay the costs of this court.

Decree affirmed.

RIVERS V. THOMAS.

(1 Lea. 648.)

Negotiable paper—indorsement after maturity.

One who indorses an overdue note, at request of the maker, in consideration of indulgence by the payee, is liable as a guarantor.

BILL in equity to hold defendant as guarantor of a note. The opinion states the facts.

Goodlett, House & Merritt, for complainants.

Lurton, Quarles & Daniel, for defendants.

COOPER, J. The bill is filed to hold the defendant, N. L. Thomas, liable as security or guarantor of the payment of a note, and to subject to the satisfaction of the recovery certain property conveyed by him to his son without consideration. It is conceded that the conveyance will not avail against the complainants' demand if established, and, consequently, that the court has jurisdiction of the whole case under the Code, section 4288.

On the 14th of February, 1859, the defendant, J. J. Thomas, executed his note under seal to the testator of the complainants, payable one day after date, for \$2,337. In the month of February, 1871, one of the complainants called upon the said Thomas for payment of the note, when the latter proposed, if complainants would wait on him, to give his brother, the defendant, N. L. Thomas, as "security upon the note." They, thereupon, went together to the residence of N. L. Thomas, and the said N. L. Thomas, at the request of J. J. Thomas, wrote his name on the back of the note. The testimony leaves no doubt that the object of the visit, the obtaining of additional security on the note in consideration of forbearance of suit, was explained by the debtor to his brother before the signature of the latter was indorsed, and that the indorsing brother knew he was assuming, and intended thereby to assume, whatever responsibility the act created. The complainants did forbear to sue for about a year, the maker of the note in the meantime becoming insolvent. No demand of pay-

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ment of the note was made of the maker subsequent to the indorsement, nor, of course, was any notice of non-payment given to the defendant, N. L. Thomas. The words "I guarantee the payment of the within note" were afterward written, at the instance of the complainants and by their counsel, over his name as indorsed.

It is not denied that an agreement to forbear suit for an indefinite time, which would mean a reasonable time, or an actual forbearance would constitute a sufficient consideration to sustain a promise to guarantee the payment of a note. *Tappan v. Campbell*, 9 Yerg. 436; *Johnson v. Wilmarth*, 13 Metc. 416; Sto. on Prom. Notes, § 186. And the evidence shows due diligence by the complainants to collect their debt from the maker, and that the latter became insolvent before the expiration of the reasonable time of forbearance, if these facts are at all important in determining the rights of the parties. Something was said in argument upon the point whether parol testimony was admissible to show the contract between the parties. But the decisions of this State, in accord with the weight of authority in other States, are that, as between the immediate parties, parol evidence is admissible to show the actual agreement upon which an indorsement of negotiable paper is made, and that the indorsement may be filled up accordingly. *Comparree v. Brockway*, 11 Humph. 360; *Iser v. Cohen*, 1 Baxter, 421; Dan. Neg. Instr., §§ 710, 1765; Sto. on Prom. Notes, § 459; *Rey v. Simpson*, 22 How. 341. And where the promise has arisen out of some new consideration of benefit or harm moving between the new contracting parties, it is not within the statute of frauds. *Hall v. Rodgers*, 7 Humph. 536; Sto. on Prom. Notes, § 457. The note under consideration is negotiable under our statute. Code, § 1957. The contest is, therefore, narrowed down to the liability incurred by the indorsement, either implied by law or shown by the proof.

The decisions on the presumptive status of an irregular indorser of a negotiable note, in the absence of any evidence whatever of intent or contract, are irreconcilably in conflict. When nothing appears but the instrument itself bearing the name of a third person as indorser before the name of the payee, and the suit is by the indorsee for value before maturity, some courts treat such third person as a joint maker; some as a surety or guarantor in the sense of joint maker; some as secondarily liable as a guarantor; and some as a second indorser. 1 Dan. Neg. Instr., § 713. The

weight of authority is, perhaps, at this time in favor of considering him, in such case, as a second indorser. For the Supreme Court of Massachusetts, with which court the doctrine of holding such indorser as a co-maker originated, afterward conceded that, if the point were new, he should be treated by third parties simply as a second indorser, leaving the payee and himself to settle their respective liabilities according to their own agreement. *Union Bank v. Willis*, 8 Metc. 504. Between the payee and such indorser the weight of authority, as we have seen, is that parol proof of the facts and circumstances which took place at the time of the transactions, and of the intention and agreement, is admissible. 1 Dan. Neg. Instr., § 711. And such is the settled doctrine of this State, while in the absence of such proof our courts have adopted the rule that the irregular indorser is to be treated only as a second indorser. *Comparree v. Brockway*, 11 Humph. 355; *Clouston v. Barbieri*, 4 Sneed, 336; *Brinkley v. Boyd*, 9 Heisk. 149; *Iser v. Cohen*, 1 Baxter, 421. In the last of these cases, which was a suit by the payee of a note against the indorser, it was accordingly held that an indorser may, by agreement, enlarge his liability, and that it is competent, upon the trial, to show by parol evidence the nature and extent of his undertaking. The indorsement sued on was made, before the delivery of the note to the payee, for the accommodation of the maker, and the evidence disclosed the fact that, when the payee objected to the form of the paper, the indorser said it was the same thing as if he had signed his name on the face of the note, and he was held liable as a co-maker.

The principle of our decisions is unquestionably sound, though there may be some doubt as to the correctness of its application to the facts of one or two of the cases. In *Brinkley v. Boyd*, 9 Heisk. 149, there was nothing to rebut the legal presumption that the defendant intended to become a second indorser. "The proof does not show," says the eminent judge who delivers the opinion of the court, "any understanding, intention, or agreement on the part of Brinkley as to the nature of the liability assumed by him in said indorsement." To the extent of the actual rulings on the facts, the decision is sustained by the general principle, although the payee of the note may have had reason to suppose from the nature of the transaction, that the defendant intended to assume a higher grade of responsibility, or, at any rate, a responsibility to him. For it may be that the defendant was induced to indorse the

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note for the accommodation of the maker under the assurance that he was to be second, and not first indorser. As between the payee and the indorser whatever may be the rights of innocent third parties, the former may well be required to know that the latter can only be made liable to him by agreement, either express or fairly implied from the conversation between them, or the facts and circumstances shown in proof.

In *Comparree v. Brockway*, 11 Humph. 355, it does not appear that the payee had ever had any interview with the defendant whom he was suing as indorser, nor that the witness examined was present when the indorsement was made. The witness proved that the defendant agreed to indorse the note as accommodation indorser of the maker for the payee's benefit. It does not appear that the liability of the defendant as indorser was fixed by demand and notice, and it does appear that the blank indorsement was filled up by the plaintiff's counsel by writing above it, "for value received I promise the payment of this note to R. H. Brockway." The opinion of the court was delivered by Judge McKINNEY, one of the most logical reasoners and accurate thinkers of the judges who have presided in this court. The logic of his argument is, that there is no sufficient proof to sustain the indorsement as filled up, that the indorsement is consequently a blank indorsement, and the defendant might have been charged as indorser. The mode he suggests by which the defendant might have been charged as indorser is that the payee could have indorsed the note, thus making it negotiable and putting it into circulation, and at the same time taking care to restrict his own liability. This suggestion is apparently sanctioned by the chancellor in the Court of Errors of New York, in *Hall v. Newcomb*, 7 Hill, 416. But there is a good deal of point in Senator Bockee's reply in that case to the suggestion, that "this sort of finesse and shuffling game is below the dignity of the law." And the point has been directly ruled otherwise upon a similar case to the one Judge McKINNEY thought he had before him, namely a blank indorsement without more, before delivery to the payee, in *Phelps v. Vischer*, 50 N. Y. 66; 10 Am. Rep. 433. Feeling the narrowness of his standing ground Judge McKINNEY, with commendable caution, concludes his opinion thus: "We go no further than to hold that a blank indorsement in a case like the present creates no other liability than that of an ordinary commercial indorsement; and that the indorser, in the absence of coun-

tervailing proof, cannot be held bound in any other or different form." In this view, the decision is in accord with the general principle recognized.

In *Clouston v. Barbieri*, 4 Sneed, 336, the suit was by the payee against the indorser as a joint promisor with the maker. A witness proved that the note was given for land sold by the payee to the maker, that the defendant, in the presence of the payee, agreed to go the maker security and upon this consideration the payee agreed to give up any lien on the property sold. The witness was, however, not present when the notes were given. The learned judge who delivers the opinion of the court in this case, holds that the word "security" might apply as well to an indorsement as to a liability as co-maker of the note, and as the defendant did become indorser, instead of surety on the face of the paper, he must be treated as an indorser. This case, he says, "can only be regarded as a blank indorsement of commercial paper, and as such, could only be filled up with a general indorsement, leaving to the indorser all the advantages and liabilities incident to that character and none other or different." Conceding the correctness of this conclusion, the decision was also in accord with the principle recognized by our courts.

I am free to say that while conceding the correctness of the law as announced in these opinions, I think it was wrongly applied to the facts of these cases. There was evidence in both of them to show knowledge on the part of the indorsers of the facts of the case, and an intention on their part to become directly bound to the payees for the price of the consideration received by the makers of the notes on the faith of the indorsements. If they could not be held liable as indorsers, and it is conceded in the first case that it could only be done by indirection, what Senator Bockee styles a "sort of finesse and shuffling game," and it seems to be taken for granted in the last case that it could not be done at all, then, upon the universally recognized maxim "*ut res magis valeat quam pereat*," they ought to have been held as guarantors or co-makers. At any rate, there was enough evidence in both cases to have gone to the jury upon the question of intent, and their verdict would doubtless have been, as it was on the first trial in the Brockway case, in favor of the plaintiffs.

The case before us differs from all of these cases we have been considering in two respects. In the first place the indorsement was made after the maturity of the note, and, therefore, the pre-

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sumption of law arising from a blank indorsement at the inception of negotiable paper does not arise. In the second place the indorsement was made in the presence of the personal representative of the payee, upon a new consideration then passing, and under such circumstances as to demonstrate that the indorser intended to become bound directly to the payee.

In his masterly summary of the liabilities created by irregular indorsements, Mr. Justice CLIFFORD says that if the indorsement be subsequent to the making of the note, at the request of the maker pursuant to a contract with the payee for further indulgence, the indorser is liable as guarantor. *Rey v. Simpson*, 22 How. 341. In Vermont the courts hold the indorser liable as a co-maker. *Strong v. Riker*, 16 Vt. 554. All the other cases which I have been able to find treat such an indorser as a guarantor. *Irish v. Cutter*, 31 Me. 536; *Tenney v. Prince*, 4 Pick. 385; *Beckwith v. Angell*, 6 Conn. 315; *Camden v. McKoy*, 3 Scam. 437; *Oakley v. Boorman*, 21 Wend. 588; *Greenough v. Smead*, 3 Ohio St. 415; Sto. on Prom. Notes, §§ 133, 477; 1 Dan. Neg. Instr. 715. I find no case where he has been treated simply as an indorser. And even if the presumption of law arising solely from the indorsement of a past due note were the same as in the case of an indorsement at the inception of the note, the facts and circumstances attending the indorsement in the present instance would remove the presumption and bring it within the authorities.

The decree of the chancellor must be reversed with costs, and a decree entered here in accordance with this opinion.

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(1 Lea. 704.)

Deed — boundaries — middle of stream.

A conveyance of land bounded by a creek extends to the center of the main branch if an island divides it into unequal branches.*

BILL to test the ownership of an island. The opinion states the facts.

* See, as to construction of grant bounded on a stream, *Loomington v. County of St. Clare* (84 Ill. 56), 16 Am. Rep. 516, and note, 524.

Wilson & Vertrees, for complainants.

Scay & Blackmore, for defendants.

COOPER, J. Bill filed to test the ownership of an island in Bledsoe creek. The complainants own the land on the west bank of the creek, and claim the whole island as a part thereof. The defendant owns the land on the east bank, and claims about one-half the island.

From a period whereof the memory of man runneth not to the contrary, the island in controversy seems to have been in existence, varying at times in height and size, but always visible at ordinary stages of the water, and only covered at high floods. From the 6th of January, 1847, when the title of the complainants begins, the witnesses concur in thinking that the island has been increasing, in width toward the west, and in length down stream certainly, and perhaps up stream also. All the witnesses who speak on the point agree in a fact which seems to militate against the supposed extension up stream. They say that there are some large sycamore trees at the upper end of the island, standing upon roots now high out of the water, which must have antedated the date mentioned. The probability is, that the increase in length has been principally down stream, and in width toward the western bank, that bank being low and alluvial, while the opposite bank is principally a high bluff. The stream is in one body from an old dam several hundred yards above the island and separates into two branches at the head of the island, the branch on the east curving gently against the foot of the bluff, while the western branch runs at present almost at right angles across the head of the island. All the witnesses agree that the eastern branch is now, and has been for many years, the main stream, the western branch toward the head of the island becoming dry, or nearly so, in very low water. There is a difference of opinion among the witnesses as to whether the two branches have always been of the same relative size. Several witnesses say that the western branch was at one time the largest, but the weight of testimony is that the main stream has always been to the east of the island, and has always occupied the existing bed. There is testimony tending to show a gradual washing away in freshets of the western bank until stones were so thrown as to prevent further encroachment. I am inclined to think the statement

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of John Branham, Sr., one of the complainants, in his deposition, is substantially correct. "The west bank," he says, "has been constantly receding, how far I can't state. With this exception, and the fact that the island was not as long as it is now, the appearance of the creek, banks and island is about now as it was when I went there." The middle line between the two banks as they now exist bisects the island, lengthwise, into two nearly equal parts.

The grant of land by the State, bounded by, on, or along a stream not navigable, carries title to the center or thread of the stream and to an island lying next to that bank between it and the middle line. *Stuart v. Clark*, 2 Swan, 10; *Lunt v. Holland*, 14 Mass. 149; *Luce v. Carley*, 24 Wend. 451; *Claremont v. Carleton*, 2 N. H. 369. The same rule applies to a private grant, where the grantor owns the entire stream. *Hayes v. Bowman*, 1 Rand. 417; *King v. King*, 7 Mass. 496. The thread of a stream is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water, at its medium height, neither swollen by freshets nor sunk by drought. If there be an island on one side of that line, or if an island form there, it belongs to the owner of the bank to which it is nearest, and the *filum aquæ* is in the center of the stream beyond. *Missouri v. Kentucky*, 11 Wall. 395; *Walker v. Board of Public Works*, 16 Ohio, 544. If the island be situated, or be formed so as to cover the middle thread, it would belong in severalty to the owners of the land on each bank, according to the original dividing line or *filum aquæ*, curving with the shores. *Ingraham v. Wilkinson*, 4 Pick. 274; *Deerfield v. Arms*, 17 id. 41; *McCullough v. Wall*, 4 Rich. 68. The existence of an island, whether old or newly formed, necessarily creates two streams, each of which will have its own *filum aquæ* as to that part of the stream in relation to any new acquisition of title to land bordering thereon. *Hopkins Academy v. Dickinson*, 9 Cush. 544. And gradual accretions to such an island, as to any new titles, would go to the previous owner. *Saulet v. Shepherd*, 4 Wall. 508.

At the time the parties to this suit acquired their respective titles to the lands on either bank, the island in controversy was in existence. The defendant claims under a chancery decree made in December, 1873, directing the clerk and master to make title in accordance with a survey, the calls of which are for courses and

distances, fixing the line, it seems, at low-water mark on the east bank of the creek. Such a boundary, we have seen, would, at most, carry title only to the thread of the eastern branch of the creek. It is conceded, therefore, that the question is whether the complainants own the whole island.

In 1828, and again in 1834, a deed seems to have been made of the land on the west bank of the creek, the boundary lines of which call for low-water mark on the eastern bank. The deed, however, to which complainants trace back their title, conveyed the land on the west bank, above the old dam and extending down below the island, giving the creek boundary thus: "Beginning at a stake in the edge of the creek, thence down said creek, with its several meanders, including all the creek until it passes where the old dam stood, and then half the creek to a stake in said creek." Afterward, Jameson, to whom and the elder Branham the deed had been made, conveyed his interest in the property to the complainant, John T. Branham, the line crossing the creek above the dam to the east bank, and running down that bank so as to include the whole creek to the dam. The deed then proceeds thus: "Thence with the mill dam to the center of the creek, thence down the center of the creek with its meanders, to a point on a straight line with the first named line, so that a line running north 21-2° west from the middle of the creek will strike the beginning."

The last deed, it will be noticed, calls for a line down the center of the creek with its meanders. If the stream is in one body the call is for the *filum aquæ* at the ordinary stage of the water. If the stream divides into two branches, the call may be for the *filum aquæ* as it would have been if the island, which separates the waters, had not existed; or it may mean the *filum aquæ* of the main channel. In *Missouri v. Kentucky*, 11 Wall. 401, the Supreme Court of the United States take for granted that the boundary of States which calls for the "middle of the river Mississippi," means the middle of the main channel, not the *filum aquæ* measuring from the outside bank on the one side to the bank on the other side. The inconvenience of a different construction is obvious, for it might result in running the line through islands in every imaginable direction. The same inconvenience, *magnis componere parvis*, might follow the construction of a private grant between individuals. The grantor, unless he plainly said so, could hardly, by a call for the center of a stream, be held to intend to divide an island into

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uncertain fractions between him and his grantee. It is more reasonable to suppose that the intention was to follow the center of the main stream, the more especially as a call for the stream or its bank would carry title to the middle thread. A call for half of a stream requires the same construction in order to avoid the like evils. We are the more willing to accept the conclusion in this case, because the evidence leaves no doubt that the owners of the land on the west bank, which has been the site of a mill since early in the century, have always treated the island as an extension of the low land on their side, and the loss in washing has been from their bank.

The decree below will be reversed with costs.

Decree reversed.

INDEX.

ACTION.

For obstructing levy — who may maintain.] The agent of a railroad company obstructed an officer in levying an attachment upon goods loaded upon one of the trains of the company, and removed the goods out of the State by running out the train. *Held*, not to furnish a cause of action against the company, at the instance of the plaintiff in the attachment. *Western Railroad v. Thomas* (Ga.), 411.

Against married woman.] See MARRIAGE, 566.

On county warrants.] See COUNTY WARRANTS, 261.

To recover money paid on contract void under statute of frauds.] See STATUTE OF FRAUDS, 351.

When justification of libel, ground of.] See SLANDER AND LIBEL, 431.

ADMINISTRATOR.

Sale of real estate by.] See JURISDICTION, 161.

See EXECUTOR AND ADMINISTRATOR.

AGENCY.

1. Undisclosed principal.] Defendant purchased of plaintiff wheat on his own credit, ordering it to be charged to him, and stating that it was for, and to be delivered at, the "Blissville Distillery." Plaintiff did not know the proprietors of the distillery. Subsequently the agent disclosed the names of the principals, and the plaintiff commenced an action against them. *Held*, that whether the principal was disclosed on the sale was a question of fact, and that the subsequent disclosure and action against the principals was not conclusive of an election to hold them alone responsible, but was evidence for the jury on that contested fact. *Cobb v. Knapp* (N. Y.), 51.

Declaration of agent.] See EVIDENCE, 18.

Of husband as to wife's separate property.] See MARRIAGE, 23.

ALIBI.

See CRIMINAL LAW, 663.

ANIMALS.

Liability of common carrier of.] See CARRIER, 23.

ANTENUPTIAL CONTRACTS.

See MARRIAGE, 23.

ARREST.

After discharge on habeas corpus.] *See* HABEAS CORPUS, 218.

ASSAULT.

Infant—liability for unintentional assault.] An infant is liable for his torts like an adult. A charge of unlawful assault by shooting is sustained by proof of a shooting, and it is not necessary for the plaintiff to show an intention or negligence on the part of the defendant, but it is for the defendant to show an absence of such intention or negligence. *Conway v. Reed* (Mo.), 354.

ASSESSMENTS.

1. For local improvements—duty of commissioners in making.] Statutes delegating power to charge the property of individuals with the cost of local improvements must be strictly pursued, and any substantial departure from the prescribed formula vitiates the proceedings. *Merritt v. Village of Portchester* (N. Y.), 47.
2. Statutory construction.] Commissioners, appointed by legislative authority to apportion and assess the cost of a local improvement, were required by the statute to make oath, before entering on their duties, "faithfully and fully to discharge the duties." The oath taken was that each would perform the duties "to the best of his ability." In action to restrain the collection of the assessment, *held*, that their proceedings were illegal for defect in the oath. *Ib.*
3. —.] Commissioners, appointed by statute to assess the cost of a local improvement, were by the statute required after making the assessment to publish notice of the time and place when and where the parties could be heard. The notice published was that "all persons feeling themselves aggrieved must present their objections in writing." *Held*, that the commissioners exceeded their jurisdiction in thus restricting the parties, and that the objection was not waived by appearing and filing written objections to two reports, which were sent back for correction, a new assessment being subsequently made with the same requirement for written objections. *Ib.*
4. Estoppel.] A party who signs a petition asking for the enactment of a municipal ordinance for the grading and paving of a street; and who is elected and acts as one of the commissioners in the performance of the work, selling the bonds of the city and expending the proceeds in the work, and in assessing the property benefited, including his own, is estopped from denying the validity of the act of the legislature by virtue of which the ordinance is passed or of the mode of assessment thus adopted. *Biswell v. Pittsburgh* (Penn.), 662.

See TAXATION.

ASSIGNMENT.

Of prospective profits—rights of prior judgment creditor.] An agricultural society assigned for the benefit of their creditors the proceeds of a

ASSIGNMENT — *Continued.*

fair about to take place on their grounds. *Held*, that such assignment was void as against the lien of an execution issuing before the payment of such proceeds to the creditors. *Huling v. Cabell* (W. Va.), 563.

Check does not operate as.] *See* BANKS, 55.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Foreign assignment — delivery by mail — comity.] S., a resident of this State and a creditor of W., who resided in the State of Missouri, prepared and sent to W., for execution, a deed of assignment to himself, in trust of all the debtor's property, real and personal, situate in this State, "for the benefit of all his creditors, under the insolvent laws of Ohio," which deed W duly executed and placed in a post-office in the State of Missouri, addressed to S. in the State of Ohio, who received the same by due course of mail, and immediately entered upon the execution of the trust. *Held*, the assignment was complete and effectual to pass title to the assignee, from the time the deed was placed in the post-office, as against subsequent attaching creditors. *Johnson v. Sharp* (Ohio), 529.

ATTACHMENT.

Action for obstructing levy — who may maintain.] *See* ACTION, 411.

ATTORNEY.

Power of, by wife to husband.] *See* MARRIAGE, 88.

ATTORNEY AND CLIENT.

Agreement to compensate attorney — interest in non-assignable cause of action.] A having sustained personal injuries by the negligence of B, employed C as attorney to sue therefor, upon the agreement that C was to have a certain proportion of any recovery for his compensation. C notified B of the arrangement. The suit was brought, and C settled with A, and obtained his release. *Held*, that such release was a bar to the action. *Coughlin v. N. Y. C. & H. R. R. Co.* (N. Y.), 75.

Champerty.] Although champertous contracts are void, yet, as it is an essential element of such a contract that the attorney is to contribute to the expenses of the litigation, an agreement merely, that the attorney is to receive, as compensation for his services, a portion of the subject-matter of the litigation, is not champertous. *Duke v. Harper* (Mo.), 814, and note, 819.

AUTREFOIS ACQUIT.

See CRIMINAL LAW, 390.

BAILMENT.

See LIEN.

BANKS.

1. **Check — equitable assignment of bank deposit.]** A check in the ordinary form does not operate as an assignment of so much of the drawer's funds in the drawee's hands. *Attorney-General v. Continental Life Ins. Co.* (N. Y.), 55.
2. **—.]** An insurance company gave a check on a trust company in payment of a loss. The company's deposit at the time was larger than the amount of the check. Before the check was presented, a receiver of the company drew all the funds on deposit. The check not having been drawn on a particular fund, *held*, that the payee was not entitled to payment by the receiver in preference to other creditors of the company. *Id.*
3. **Check for illegal consideration — rights of bona fide purchaser.]** Pursuant to an arrangement between an assignee and the creditors in bankruptcy, a check to his order, and dated the day it was drawn, was deposited with a third person, for delivery to the payee, on his discharge as assignee. Fourteen months afterward, on such discharge, it was delivered upon the order of the assignee, to a *bona fide* purchaser. In an action on the check by such holder, against the drawer, *held*, (1) that although invalid in the hands of the payee, it was valid in the plaintiff's hands; (2) that it had no inception until it was delivered to the payee, and the plaintiff was not put upon inquiry as to its prior date. *Cowing v. Altman* (N. Y.), 70.
4. **Certifying check — action against drawer.]** A bank is liable on a check certified by it, whether the drawer had sufficient funds or not. *French v. Irwin* (Tenn.), 769.
5. **Certification operates as payment.]** Where the holder of a check procures it to be certified, this operates as payment of the debt for which the check was drawn and the drawer is released from liability. *Id.*
6. **Certification of check not in usual course of business.]** A drew upon a bank in which he had no funds a check reciting that it was "to hold as collateral," etc. The cashier certified it. *Held*, that the bank was not bound by such certification, the check manifestly not being in the usual course of banking business. *Dorsey v. Abrams* (Penn.), 657.
7. **Power to purchase negotiable paper.]** A bank, empowered to discount negotiable notes, has power to purchase such notes. *Pape v. Capital Bank* (Kans.), 183.

See NATIONAL BANKS.

BEQUEST.

See WILL.

BETTERMENTS.

See ASSESSMENTS.

BILLS AND NOTES.

See NEGOTIABLE INSTRUMENTS.

BOARD OF EDUCATION.

Liability for negligence.] *See* NEGLIGENCE, 414.

Power of, as to pupils.] *See* SCHOOL.

BOND.

Liability of surety — forged signature of co-surety.] *See* SURETY, 214.

BOUNDARIES.

1. **Practical location of.]** Where the division line between two adjoining estates is indefinite or unascertained, the owners may effectually agree upon the true boundary, and the line thus ascertained will control their deeds. *Turner v. Baker* (Mo.), 226, and note, 239.
2. **—.]** A jury may infer a practical location of a disputed boundary line by agreement, from long acquiescence, less than the period necessary to constitute adverse possession, and from acts and declarations of the parties. *Ib.*

See DEED.

BREACH OF PROMISE TO MARRY.

See MARRIAGE.

BURGLARY.

See CRIMINAL LAW.

CARRIER.

OF GOODS.

1. **Contract relieving from negligence.]** In a contract limiting the liability of a common carrier, an exemption of liability for his own negligence will not be inferred unless unequivocally expressed. So where, by a contract of shipment of animals, a carrier, in consideration of a reduced rate of freight, was released from "liability of every kind whatsoever," by reason of damage "from whatsoever cause arising;" *held*, that this did not include a loss arising from the carrier's own negligence. *Mynard v. Syracuse, etc., R. R. Co.* (N. Y.), 28.
2. **Liability as to animals.]** A carrier of animals is under the same liability as other common carriers, except where the damage for which compensation is sought is a consequence of the conduct or propensities of the animals. *Ib.*

OF PASSENGERS.

2. **Commutation railway ticket for limited time — rights of holder.]** A commutation railway ticket, conditioned to be "good for 1,000 miles" and "within six months," is not good after six months, although the holder has not traveled 1,000 miles on it; and where, after the expiration of that period, he enters the baggage car of the company, and refuses to pay his fare except by presenting such ticket, he is a trespasser, and may be ejected at any point, and is not entitled to the benefit of a statute which prohibits the ejection of passengers except near a dwelling-house or at a station. *Lillis v. St. Louis, etc., R. R. Co.* (Mo.), 255.

CARRIER — *Continued.*

4. Rights of passenger in caboose.] A person got into a caboose attached to the rear of a mixed freight and passenger train, and while riding there was killed by the negligence of the railway company. The caboose was forbidden to all but employees of the company. The deceased was not such employee, and it did not appear that he paid any fare. *Held*, that the legal presumption was that he was a passenger travelling for a consideration, and the company was liable in damages for his death. *Creed v. Pennsylvania R. R. Co.* (Penn.), 698.

Discrimination as to passengers — penalty — satisfaction.] *See* STATUTORY CONSTRUCTION, 718.

CASES OVERRULED, DOUBTED OR DENIED. *See ante*, p. 2.

CERTIFICATION OF CHECK.

See BANKS.

CHAMPERTY.

See ATTORNEY AND CLIENT, 814.

CHARACTER.

See EVIDENCE.

CHECK.

See BANKS; GIFT, 531.

CITY.

See MUNICIPAL CORPORATIONS.

CIVIL DAMAGE ACT.

Death of intoxicated person.] In an action under the civil damage act, for injury to means of support in consequence of intoxication which caused the death of the intoxicated person, damages resulting from the death cannot be recovered. *Davis v. Justice* (Ohio), 514, and note, 518.

COMMON CARRIER.

See CARRIER.

CONSTITUTIONAL LAW.

1. Removal of member of legislature from office.] The Constitution of Kansas declares that each house of the legislature "shall be judge of the elections, returns and qualifications of its own members." The legislature enacted that "any State, district, city, county or township officer, for whose removal from office by impeachment there is no provision," on conviction of intoxication shall be removed from office by the court. The Constitution also provides that "the governor, and all other officers under the Constitution, shall be subject to impeachment." *Held*, that the act is unconstitutional as vesting in others the power exclusively delegated by the Constitution to each house. *It seems* that members of the legislature are subject to impeachment. *State ex rel. Martin v. Gilmore* (Kans.), 189.

CONSTITUTIONAL LAW — *Continued.*

2. **Uniformity of taxation.]** Under a constitutional provision that the rate of taxation shall be uniform and equal, the legislature may, in dividing a county or township, relieve the personal property of the detached territory from all liability for previous debts of the county or township, while continuing the liability of all the other property. *Commissioners of Ottawa Co. v. Nelson* (Kans.), 101.
3. **Quo warranto — jury trial.]** In case of *quo warranto* the defendant has no constitutional right to a jury trial. *State ex rel. Norton v. Lupton* (Mo.), 258.
4. **Inter-State commerce.]** A statute prohibiting the transportation from one State to another of prairie-chickens, which have been lawfully killed, is void as in contravention of the provision of the Federal Constitution, granting to Congress the power to regulate commerce among the several States. *State v. Saunders* (Kans.), 98.
5. **Municipal power of taxation—tax on express companies—regulating commerce among the States.]** A city was authorized by its charter to license, tax, and regulate merchants, express companies, agents, insurance companies, etc. Under this power it imposed an *ad valorem* tax on the gross annual receipts of an express company derived from its business done in the city. The business of the company consisted in receiving goods for transmission to points outside the State, to which its own line did not extend. *Held*, (1) that the power conferred was valid under the State constitutional provision enjoining a uniform rule of taxation; (2) that it was not in conflict with the provision of the Federal Constitution granting to Congress the exclusive power to regulate commerce among the several States; (3) that its exercise was valid, although the tax was different from that imposed on merchants. *American Union Express Co. v. City of St. Joseph* (Mo.), 882.
6. **Business license.]** A State statute requiring any person engaged in hiring laborers in the State for employment beyond the limits of the same to procure a license and pay therefor one hundred dollars, and making it penal to carry on the business without such license, is constitutional. Money properly paid into the county treasury, by a person who has applied for and obtained the license, cannot be recovered back, by mandamus or otherwise. *Shepperd v. County Commissioners* (Ga.), 394.
7. **Taxation of steamboats.]** An annual tax in West Virginia, on the value of steamboats plying between West Virginia and Ohio, and owned and having their home port in the former State, is not in violation of the provisions of the Federal Constitution prohibiting the States from levying tonnage duty and securing to Congress the exclusive right to regulate inter-State commerce. *Wheeler, etc., Transportation Co. v. City of Wheeling* (W. Va.) 552.

Subpoena to governor.] See GOVERNOR, 667.

Vacancy in office.] See OFFICE, 206.

CONTRACT.

1. "Support of family" — physician's services.] A requested B to let "C and his family have whatever they might want for their support," and promised to pay him therefor. B, at the instance of the family, employed a physician to attend them. *Held*, that B could not recover from A, for his services and the medicine furnished by him. *Grant v. Dabney* (Kans.), 125.
2. Fraud—insolvency as evidence of.] A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. *Talcott v. Henderson* (Ohio), 501, and note, 504.
3. —.] But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact. *Id.*

Antenuptial] *See* MARRIAGE, 22.

For service.] *See* MASTER AND SERVANT, 7.

Validity of.] *See* STATUTE OF FRAUDS.

CONTRACTOR.

See MUNICIPAL CORPORATIONS, 642; NEGLIGENCE, 699.

COUNTY WARRANTS.

Acknowledgment of indebtedness.] A county warrant, payable "out of any money in the treasury appropriated for county expenditures," is both a judicial ascertainment and a written acknowledgment of indebtedness by the county, and, if not paid, an action may be maintained on it whether there is money in the treasury to pay it or not. *International Bank v. Franklin County* (Mo.), 261.

CRIMINAL LAW.

1. Indictment — time, place and parties.] An indictment for murder charged that "on or about the — day of —, A. D. 1871, at the county of Jasper and State of Missouri," defendant and W. S. "made an assault on H. S. with pistols," which, "they, said John and William, in each of their right hands had and held, and did then and there unlawfully," etc., "and of his malice aforethought, shoot off and discharge at," etc., "and of the mortal wounds inflicted upon him the said H. S. did then and there instantly die." *Held*, to state time and place with sufficient certainty and to charge a joint offense. *State v. Steeley* (Mo.), 271.
2. — uncertainty — disjunctive conjunction.] An indictment charging in the words of the statute, the sale of intoxicating liquor, without a license, "to be drunk in, upon or about the building or premises where sold," is bad for uncertainty. *State v. Charlton* (W. Va.), 603.

CRIMINAL LAW — *Continued.*

3. **Autrefois acquit.**] Acquittal in a State court on a prosecution by the State for assault and battery will not protect the accused from subsequent trial and conviction in a municipal police court, under a city ordinance, upon the charge of disorderly conduct in fighting, though the same transaction and state of facts be involved in both trials. *McRea v. The Mayor* (Ga.), 890.
4. **Alibi—presumptions as to failure to prove.**] An instruction to a jury in a criminal case, that an unsuccessful attempt to prove an *alibi* is an attempt to manufacture evidence which always bears against the prisoner, is erroneous. *Turner v. Commonwealth* (Penn.), 683.
5. **Handcuffing prisoner during trial.**] The mere fact that a prisoner brought before the examining magistrate remains handcuffed during the proceedings, and in that condition waives a preliminary examination, will not support a plea in abatement to the information of the offense. *State v. Lewis* (Kans.), 118, and note, 116.
6. **Escape and subsequent acquittal.**] Where one, being imprisoned and awaiting trial on a criminal charge, escapes, and being re-arrested is tried and acquitted of such charge, he cannot maintain such acquittal in bar of an information for such escape, under a statute providing for the punishment of any person escaping "before conviction." *Id.*
7. **Defendant's waiver of full panel of jurors.**] On the trial of an indictment, the prosecuting attorney proposed to go to trial with less than the legal number of names of jurors in the box to be drawn from. The defendant's attorney consented. The prisoner being convicted, *held*, that such consent did not validate the conviction. *State v. Davis* (Mo.), 387.
8. **Limiting time of prisoner's counsel in addressing jury.**] In the trial of a felony, whether the prisoner is heard through one counsel or two, the length of the argument is not a matter for pre-determination by the court. As argument progresses the court may confine the range of it to the facts and law of the case, and may interdict idle repetition; but so long as counsel speaks to the point, proceeds in good faith, and wastes no time, the court should forbear to interfere, but leave the limits of the speech to the discretion of the speaker, until it is manifest that the discussion is complete, or the subject exhausted. *Williams v. State* (Ga.), 412, and note, 413.
9. **Evidence—letters from prisoner to his wife.**] On the trial of an indictment, a letter written by the defendant to his wife, but not in the custody or control of either of them, or any representative of them, but in the custody and control of the prosecuting witness, is competent evidence against the defendant, although a civil statute prohibits husband and wife from testifying to any communication by one to the other during marriage, and a criminal statute extends the provisions in civil cases to the "examination" of witnesses in criminal proceedings. *State v. Buffington* (Kans.), 193.
10. **Prisoner as witness.**] On the trial of a criminal information, the prisoner, having testified on his own behalf, cannot, on cross-examination, be

CRIMINAL LAW — *Continued.*

required to disclose communications between himself and counsel, in respect to which he did not testify on his direct examination. *State v. White* (Kans.), 187, and note, 140.

11. **Discharge of jury in absence of prisoner.]** On a trial for felony it is proper for the court to discharge the jury, in the absence of the defendant, after they have deliberated without agreeing from four o'clock in the afternoon until six o'clock the next morning. *Ib.*
12. **Burden of proof.]** In criminal prosecutions the burden of proof remains upon the State throughout the trial to establish the guilt of the prisoner beyond a reasonable doubt upon the whole evidence, and an instruction that if defendant killed deceased, he is presumed guilty of murder, in the absence of proof to the contrary, and that it devolves upon him to show a mitigation or justification, is erroneous. *State v. Wingo* (Mo.), 329.
13. **Absent witnesses.]** A witness for the prisoner having been subpoenaed on a criminal trial, and not appearing, a statement of his supposed testimony was read by consent. *Held*, that the prisoner thus waived his right to the personal presence of the witness. *State v. O'Connor* (Mo.), 291.
14. **Objections to evidence.]** On a criminal trial, it is the duty of the court to exclude improper evidence offered by the State, even if not properly objected to by the prisoner. *Ib.*
15. **Verdict in absence of prisoner.]** After the jury have dispersed, with the prisoner's consent, leaving the verdict with the foreman, to be returned by him into court, it is not indispensable that the prisoner should be present when the act of return takes place in pursuance of the consent; and though he be confined in jail at the time, the verdict will not, on that account, be illegal. *Smith v. State* (Ga.), 398, and note, 394.
16. **Burglary — "dwelling-house."] An indictment charged the breaking and entering in the night-time of a "dwelling-house of A and B, being copartners in business under the firm name and style of A & B."** It was shown on the trial that A and B were partners, and in their business used and occupied as stores the lower stories of two adjacent buildings, opening into each other. A, with other persons, lived in the upper rooms, and was there at the time of the burglary, but there was no internal communication between the stores and the upper rooms, the latter being accessible only through a fenced yard and a stair-case leading thence. The breaking was into one of the stores. *Held*, (1) that the ownership was properly charged as being in a partnership; (2) that the entry was into a "dwelling-house" within the statute of burglary, which enacts that no building shall be deemed a dwelling-house, unless joined to, immediately connected with, and part of a dwelling-house; that phraseology being intended only to exclude isolated, uninhabited out-houses. *Quinn v. People* (N. Y.), 87.
17. **Burglary—constructive breaking.] The prisoner, pretending to have business with the occupant of a dwelling-house, gained admittance thereto at night, with intent to commit a robbery. Held, a constructive breaking sufficient to support an indictment for burglary by breaking and entering. Johnston v. Commonwealth** (Penn.), 632.

CRIMINAL LAW — *Continued.*

18. **Burglary—opening inner door.]** Opening the inner door of a dwelling-house, at night, with felonious intent, constitutes burglary, whether the felony is to be committed in the particular room or in another. *Rolland v. Commonwealth* (Penn.), 626.
19. **Larceny—taking and concealing property to get reward.]** The wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny. *Berry v. State* (Ohio), 506.
20. **Murder—plea—relation of grand juror to deceased.]** It is not a good plea to an indictment for murder, that a member of the grand jury which found such indictment was a nephew of the person who was murdered. *State v. Easter* (Ohio), 478.

Dying declarations.] See EVIDENCE, 287.

See PARDON, 337; REMOVAL OF CAUSE, 606.

DAMAGES.

1. **For breach of warranty on sale of garden seeds.]** In an action for breach of warranty on sale of garden seeds, the measure of damages is the difference in value between the crop raised and such a crop as would have been raised had the seeds proved equal to the warranty. *White v. Miller*, 18.
2. **Nominal.]** In case of a breach of contract, actual damages not being proved, nominal damages may be recovered. *First Nat. Bank v. Telegraph Co.* (Ohio), 485.

See CIVIL DAMAGES ACT; MUNICIPAL CORPORATIONS, 299; SLANDER AND LIBEL; TELEGRAPH, 485.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

DEED.

Boundaries—middle of stream.] A conveyance of land bounded by a creek extends to the center of the main branch if an island divides it into unequal branches. *Branham v. Turnpike Co.* (Tenn.), 789.

Assumption of mortgage by grantee.] See MORTGAGE, 5.

See EASEMENT, 35.

DELIVERY.

See SALE.

DEVISE.

1. **To husband and wife.]** A devise to "A and family" is to A and his wife and children. *Hall v. Stephens* (Mo.), 302.
2. **—.]** In case of a devise to husband and wife, the devisees at common

DEVISE — *Continued.*

law are joint tenants, the survivor taking the whole estate; and the rule is the same under a statute abolishing joint tenancy *Ib.*

3. —.] In case of a devise to husband and wife with others, the husband and wife take as one person. *Ib.*
4. Sale of husband's interest.] In case of a devise to husband and wife, or to them with others, the husband's interest may be sold on execution, subject to the contingent survivorship of the wife. *Ib.*

See WILL.

DIVORCE.

Jurisdiction — impeaching judgment collaterally.] A decree of divorce, rendered in a State where neither of the parties had ever resided, and without actual notice to the defendant, is absolutely void, and if the lack of jurisdiction does not appear on the face of the record, it may be shown by extrinsic evidence. *Litowich v. Litowich* (Kans.), 145.

DOWER.

In partnership — real estate.] *See* PARTNERSHIP, 265.

DYING DECLARATIONS.

See EVIDENCE, 287.

EASEMENT.

Change of manner and place of exercise of.] Under a grant of a right to enter upon the grantor's lands and lay water-pipe, without specifying the place or the size of the pipe, after the grantee has once laid the pipe, he cannot increase the size of it, or lay it in any other place. *Onthank v. Lake Shore, etc., R. R. Co.* (N. Y.), 35.

ESCAPE.

See CRIMINAL LAW, 113.

ESTOPPEL.

From contesting assessments for local improvements.] *See* ASSESSMENTS 663.

EVIDENCE

1. Of declarations of agent.] In an action to recover damages for breach of warranty on the sale of a chattel, the declarations of the vendor's agent that the chattel was defective, made eight months after the sale, and not connected with any present business transaction, are not admissible. *White v. Miller* (N. Y.), 13.
2. To vary parol indorsement.] Parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement without recourse. *Doolittle v. Ferry* (Kans.), 166.
3. Of good character — when admissible.] A charge in the petition, that the defendant has made false and fraudulent representations, does not warrant the introduction by the defendant of evidence of good character in action to set aside a settlement. *Dudley v. McCluer* (Mo.), 273.

EVIDENCE — *Continued.*

4. **Dying declarations.]** On a trial for murder, dying declarations are admissible in evidence, when made in view of impending death and after abandonment of all hope of recovery, as to the facts and circumstances constituting the *res gesta* of the homicide, but not as to matters occurring anterior to and not immediately connected with it. *State v. Draper* (Mo.), 287.

Letters from prisoner to his wife.] See CRIMINAL LAW, 193.

EXECUTION.

See EXEMPTIONS.

EXECUTOR AND ADMINISTRATOR.

Liability of, on note signed as "Executor of," etc.] See NEGOTIABLE INSTRUMENTS, 215.

Of joint obligor—payment by—effect on co-obligors.] See LIMITATIONS OF ACTIONS, 250.

EXEMPTION.

1. **From execution.]** Under a statute exempting from execution "tools and implements" of trade or business, and "stock in trade," a lamp and show-cases with their tables and frame, of a watchmaker and jeweller, are exempt; and watches and jewelry, manufactured and in process of manufacture by him, to order or for general sale, as well as the material kept for such manufacture, are also exempt. *Bequillard v. Bartlett* (Kans.), 120.
2. **Of partnership assets.]** On execution against members of a partnership, the defendants are not entitled, either jointly or severally, to an exemption of the partnership assets, under a statutory exemption, to a certain amount of "any other property," beside specified articles allowed to heads of families. *State ex rel. Billingsley v. Spencer* (Mo.), 244, and note, 246.
3. **Homestead exemption—tenant house.]** A house and lot adjoining the homestead of the owner, in a city, and by him owned and rented to a tenant not in his employ, and occupied exclusively by such tenant and his family, is not exempt under the homestead laws excepting one acre in a city, "with all improvements," "occupied as a residence by the family of the owner," although all the land claimed to be exempt is less than one acre. *Ashton v. Ingls* (Kans.), 197.
4. **—statutory construction—head of family.]** The law provided that "each head of a family or guardian of a family of minor children" should be entitled to a homestead. *Held*, that a guardian of one minor child was entitled to a homestead. *Rountree v. Dennard* (Ga.) 401.

FIRE INSURANCE.

See INSURANCE.

FIXTURES.

1. **Test of.]** In determining whether an improvement to real estate is a fixture, the intention of the party placing it and the manner of placing it

FIXTURES—*Continued*

are not conclusive, but much depends on its object and use. *State Savings Bank v. Kirchoval* (Mo.), 310.

2. **Frame building.**] As between mortgagor and mortgagee, a frame building, resting on wooden blocks laid on the ground, designed as an office in connection with a mill, but detached therefrom, and intended by the mortgagor to be removed, is a fixture, although erected after the execution of the mortgage; and its removal will be restrained by injunction. *Id.*
3. **Dwelling-house—when personalty.**] A and B made a contract, by which A sold to B a lot of land, and B was to enter into possession and build a dwelling-house and make improvements, which were all to remain on the land until B should fulfill, and if he should not fulfill, all such improvements should become the property of A. B not having fulfilled, assigned the contract to C, who entered and built a small wooden dwelling-house on low blocks of wood. Afterward C removed the house into the highway, assigning the contract to D, and sold him the house and he removed it to other land of his own, and erected it on a stone foundation. *Held*, that A could maintain replevin for the house against D. *Central Branch R. R. Co. v. Fritz* (Kans.), 175.

FRAUD.

Constructive fraud—husband and wife.] Two months after marriage a wife whose hearing and speech were defective, whose health was infirm and whose mind was weak, conveyed all her real estate to her husband, for the consideration of one dollar, reserving a life estate. In the absence of affirmative evidence that her action was intelligent and free from undue influence, and that his conduct was fair and conscionable, *held*, that the transfer was void. *Darlington's Appeal* (Penn.), 726.

In purchase of goods—when insolvency of purchaser is evidence of.] *See* CONTRACT, 501.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See FRAUD, 726.

GIFT.

1. **Check—assignment of fund—revocation.**] The drawer of a check delivered it to the payee, intending thereby to give to the payee the fund on which the check was drawn. *Held*, that until the check was either paid or accepted, the gift was incomplete; and that, in the absence of such payment or acceptance, the death of the drawer operated as against the payee, as a revocation of the check. *Simmons v. The Cincinnati Savings Society* (Ohio), 521.
2. **Seal—gift of land by unsealed instrument—power of equity to effectuate.]** A court of equity will effectuate a gift of lands by a father to his child, evidenced only by an unsealed instrument delivered to the child. *Martling v. Martling* (W. Va.), 535.

GOVERNOR.

1. **Power of grand jury to compel attendance of governor by subpoena.]** The governor is the absolute judge of what official communications to the executive department may be revealed, and of what the official duties of that department are, and when they should be performed. *Hartranft's Appeal* (Penn.), 667, and note, 678.
- 2.—.] The governor and the subordinates of the executive department, while engaged in official duties, are not subject to the subpoena of the grand jury. *Id.*

GRAND JURY.

See GOVERNOR.

HABEAS CORPUS.

- Re-arrest after discharge on.]** A discharge on *habeas corpus* is conclusive and not appealable, and the prisoner cannot be arrested again for the same offense. *Ex parte Jile* (Mo.), 218.

HIGHWAY.

- Abandonment—adverse possession.]** Ten years' non-user of a public highway does not amount to an abandonment of the easement, nor does the inclosure of the roadway by the owner of the adjacent land for the like period entitle him to retain possession of it. *State v. Culver* (Mo.), 295.

Liability for defects in.] *See* MUNICIPAL CORPORATIONS, 396.

HOMESTEAD EXEMPTIONS.

See EXEMPTIONS, 197, 401.

HUSBAND AND WIFE.

See CRIMINAL LAW, 193; DEVISE, 802; FRAUD; MARRIAGE.

IMPEACHMENT.

Of members of legislature.] *See* CONSTITUTIONAL LAW, 189.

IMPLIED WARRANTY.

See NEGOTIABLE INSTRUMENTS, 117; SALE.

INDICTMENT.

See CRIMINAL LAW.

INDORSER.

See NEGOTIABLE INSTRUMENTS.

INFANCY.

1. **Breach of promise of marriage.]** Infancy, when pleaded, is a good defense to an action for the breach of a promise to marry. *Rush v. Wick* (Ohio), 538.

INFANCY — *Continued.*

2. Release of paternal right of custody.] The father of an infant may, by voluntary contract, release his parental power over his child to another. *Bentley v. Terry* (Ga.), 890.
3. —.] The agreement to care for the child, and the fact that the child is taken when sick, and nursed into health and strength, and supported properly and comfortably for five years are sufficient considerations to support such a contract; and the contract, though made with the wife by the child's father, will be enforced if acquiesced in by the husband, and is not revocable, except for sufficient legal reasons, such as bad treatment of the child and the like. *Ib.*
4. Liability of infant for unintentional assault.] An infant is liable for his torts the same as an adult, and is therefore liable for an unintentional assault. *Conway v. Reed* (Mo.), 854.
5. Undertaking by — ratification.] An undertaking by an infant as surety for the stay of execution is not void, but only voidable, and when ratified by him after arriving at majority, becomes a valid and enforceable contract. *Harner v. Dipple* (Ohio), 496.

See LIMITATION OF ACTIONS, 470.

INJUNCTION.

When granted to restrain collection of taxes.] *See* TAXATION, 548.

INSANITY.

Suicide induced by.] *See* INSURANCE, 699.

INSOLVENCY.

When evidence of fraud on purchase of goods.] *See* CONTRACT, 501.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

INSURANCE.

FIRE.

1. Condition — waiver — estoppel.] A policy of insurance provided that it should be void in case of assignment before loss, without the consent of the company indorsed thereon. The secretary of the company told the insured that he could assign the policy without such consent. *Held*, that this waived the condition. *Stolle v. Aetna Fire and Marine Ins. Co.* (W. Va.), 598, and note, 597.
2. Knowledge of agent — estoppel.] A policy of insurance issued to a mortgagee contained a stipulation that if any change took place in the title or possession, the policy should be void. Without the knowledge of the company, the owner sold and conveyed the property and satisfied the mortgage. *Held*, that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company, having power to make contracts and issue policies, that such assigned policy shall have the force and effect of a new policy to the purchaser, will bind the company. *Amazon Ins. Co. v. Wall* (Ohio), 533.

INSURANCE — *Continued.*

3. **Sale of part of subject.]** A policy of insurance provided that if the insured should make any other insurance on the property, *or any part thereof*, or if the property should be sold or transferred, or any change should take place in the title or possession thereof, without the company's consent, the policy should be void; and that when the property had been sold or otherwise disposed of, so that all the interests on the part of the insured has ceased, the insurance on such property should terminate. *Held*, that the insurance on the entire property was not, by these provisions, forfeited by a sale of a portion of the property. *Quarrier v. Peabody Ins. Co.* (W. Va.), 582.
4. **Statement of ownership.]** A policy provided, that if the interest of the insured is not truly stated, or is other than the entire unconditional and sole ownership, it must be so expressed in the policy, under penalty of forfeiture. *Held*, that the policy was not rendered void by the failure to disclose that at the time the policy issued there was a deed of trust on the property insured, no inquiry having been made about the state of the title. *Ib.*
5. **Warranty of occupation—concealment.]** The description in a fire insurance policy, of a building insured, as a "dwelling-house," is not, in the absence of misrepresentation or concealment as to the fact of occupation, a warranty that the building is occupied as a dwelling, and the omission of the applicant to disclose the fact that the building is vacant, in the absence of any inquiry on that point, is not a breach of a condition that any omission to make known every material fact shall avoid the policy. *Browning v. Home Ins. Co.* (N. Y.), 86.
6. **Transfer of property insured to partner.]** A policy of fire insurance on partnership property contained a condition that a sale or transfer, or any change in title or possession, of the property, by legal process, judicial decree or voluntary transfer, should avoid the policy. In an action to dissolve the partnership one of the partners was appointed receiver. *Held*, not to avoid the policy. *Keeney v. Home Ins. Co.* (N. Y.), 60.
7. **Waiver of defect in proofs of loss.]** A retention by an insurer of proofs of loss for thirty-eight days without objection will warrant a finding that all objections thereto were waived. *Ib.*
8. **Breach of warranty as to occupation.]** In a fire policy the business carried on upon the insured premises was described as the manufacture of bath tubs. On adjoining premises the insured also conducted the business of sawing and planing lumber, and the shavings therefrom were carried by a tube to feed the boiler furnace on the insured premises. *Held*, that this did not amount to a carrying on of the business of sawing and planing lumber on the insured premises. *Ib.*
9. **Adjustment of loss—waiver.]** The adjustment of loss by an insurer, with full knowledge of all the facts, operates as a waiver of conditions in the policy against other insurance, and requiring the certificate of a notary as a preliminary to payment. *Levy v. Peabody Ins. Co.* (W. Va.), 598.

INSURANCE — *Continued.*

LIFE.

10. Application — mistake of agent.] An applicant for life insurance, having correctly stated the date of his birth to the agent, is not prejudiced by the agent's mistake in writing the same in the application. *McCall v. Phœnix Mutual Life Ins. Co.* (W. Va.), 558, and note, 561.
11. Recovery by insured of premiums paid on lapsed policies.] If a life insurance company wrongfully refuses to accept a premium and determines the policy, the insured may treat the policy as determined, and recover all the premiums he has paid. *Id.*
12. Local agents — power to waive condition.] A policy of insurance provided that it should be void unless the annual premium was paid on or before the day appointed. Part of a premium had been paid to a local agent, to whom the duty of collecting the premiums was intrusted, and he, in excess of his limited powers, had given time for the payment of the balance. *Held*, that the policy was not avoided. *Murphy v. Southern Life Ins. Co.* (Tenn.), 761.
13. Insurable interest.] A policy of insurance procured by an uncle in his own favor upon the life of his nephew, in which he has no pecuniary interest, is void. *Singleton v. St. Louis Ins. Co.* (Mo.), 821, and note, 827.
14. —.] The burden of showing insurable interest is upon the claimant. *Id.*
15. Evidence — statements of insured.] In an action on a policy in favor of one on the life of another, statements of the insured as to his feelings at the time, when not too long before the application to throw light upon the subject, are admissible in evidence ; but such statements as to previous ill health are inadmissible. *Id.*
16. Evidence.] Parol evidence is admissible to explain the sense of the expression: "spitting of blood," in an application for life insurance. *Id.*
17. Forfeiture — waiver by agent of cash payment of premium — renewal.] A policy of life insurance contained the usual cause of forfeiture for non-payment of premiums. Departing from the strict rules of the company, a duly authorized agent had allowed the cash part of the premium to be paid one-half cash, the other half by a short note. Upon the 6th of July, 1867, the day the premium was due, the agent received the check of assured for the half cash due, and a six months' note, giving the renewal receipt for a year. The note contained the clause "if not paid at maturity said policy is to be null and void." Neither check nor note was paid. *Held*, (1) The mere fact that the note was not paid at maturity, did not of itself avoid the policy. It gave the insurance company the option of declaring a forfeiture, but this option must be asserted by clear and unequivocal acts. The clause of forfeiture, being inserted in the note for the benefit of the company, may be waived by failure to act, or other circumstances evincing an intention not to claim the benefit of the stipulation. Whether the company has exercised such option, or waived their rights, is a question of fact for the jury, under all the circumstances of the case. (2) The assured is entitled to a renewal, upon tendering at the proper time the proper amount of premium due. This amount does not include interest

INSURANCE — *Continued.*

on premium notes previously given, where the policy does not provide for its forfeiture by reason of non-payment of such interest. *The Mutual Life Ins. Co. v. French* (Ohio), 448.

18. *Assignability of policy.*] A policy of insurance procured by one on his own life and payable to his heirs is not assignable by him. *Gooding v. Caldwell* (Tenn.), 774.

19. *Suicide — insanity.*] A life insurance policy, conditioned to be void if the insured shall die by suicide, is not avoided by the self-destruction of the assured when insane, although he meant to kill himself and knew that death would result from his acts. *Connecticut Mut. Life Ins. Co. v. Groom* (Penn.), 689.

MARINE.

20. *Deviation — warranty.*] Where the contract of insurance on a steamboat stipulates for its continuance for one year, "unless it is terminated or made void by conditions thereafter expressed," and contains a "permission to navigate the Ohio and Mississippi rivers below Cairo," but contains no condition expressly avoiding the policy for navigating the boat outside of the permitted waters, and the boat made a trip outside of these permitted waters and returned in safety where she was afterward destroyed by fire, in no way caused or contributed to by such departure, *held*, that the only effect of such deviation was to relieve the insurer from any loss happening outside of the permitted waters, and that said policy was not avoided thereby, and that after a temporary departure and return in safety to the permitted waters, the insurers are liable for a subsequent loss covered by the policy, not caused or contributed to by such deviation. *Wilkins v. Tobacco Ins. Co.* (Ohio), 455.

INTEREST.

In action for breach of warranty.] In an action for damages for breach of warranty on the sale of garden seeds; interest on the damages from the time the crop would have been harvested and sold cannot be recovered. *Whits v. Miller* (N. Y.), 18.

INTOXICATING LIQUORS.

See CIVIL DAMAGE ACT.

JUDGMENT.

Domestic — collateral impeachment, for want of jurisdiction.] In an action to recover real estate, the plaintiff's title was founded on a sheriff's deed executed in pursuance of a sale on execution on a judgment of a justice of the peace rendered by default, on a constable's return of service of the summons by "leaving a certified copy at the defendant's usual place of residence." *Held*, that evidence was admissible to show that the return was false, in that the defendant was not, and had no residence, in Kansas, but was and had long been in, and a resident of, the Indian Territory. *Martin v. Gray* (Kans.), 149.

JUDGMENT—*Continued.*

Impeachment of, for lack of jurisdiction.] *See* DIVORCE, 145.

Jurisdiction.] *See* JURISDICTION, 161.

JURISDICTION.

1. **Administrator's sale of real estate — notice to heirs.]** Proceedings for the sale of real estate by an administrator are not proceedings *in rem*, and notice to the heirs is essential to jurisdiction. *Mickel v. Hicks* (Kans.), 161.
2. **Recital in judgment.]** A recital in a judgment of "due service" of a notice cannot prevail against evidence furnished by the same record that the notice was not duly served. *Id.*
3. **Probate courts.]** Probate courts are courts of record, with general, original and exclusive jurisdiction in respect to the administration of the estates of deceased persons, and on these subjects their adjudications are conclusive in collateral proceedings, like the adjudications of other courts of record. *Johnson v. Beasley* (Mo.), 276, and note, 286.
4. **—.]** In ejectment, the defendant claimed under a deed of the administrator of J. S., appointed by the probate court of C. county. *Held*, that the plaintiff could not show that the probate court had not jurisdiction to make such appointment because J. S. did not reside in C. county. *Id.*

In actions for divorce.] *See* DIVORCE.

JURY.

Discharge of, on failure to agree.] *See* CRIMINAL LAW, 187.

Relation of grand juror to one murdered — plea.] *See* CRIMINAL LAW, 478.

Trial by, on quo warranto.] *See* CONSTITUTIONAL LAW, 253.

See CRIMINAL LAW, 387.

LANDLORD AND TENANT.

1. **Assignment of lease — covenant to pay rent.]** A lessee remains liable on his express agreement to pay rent, notwithstanding he may have assigned his lease with the lessor's assent, and the lessor has accepted rent from the assignee. *Lodge v. White* (Ohio), 492, and note, 494.
2. **—.]** But where the obligation of the lessee to pay rent is only that which is implied by law from his occupation of the premises, his assignment of the lease and surrender of possession to the assignee, with the assent of the lessor, extinguishes the privity of estate between the lessor and lessee, and the consequent implied liability of the lessee to pay rent. *Id.*
3. **—.]** The assent of the lessor to such assignment, where nothing to the contrary appears, may be implied from his charging the rent to the new tenant and accepting payment thereof from him. *Id.*
4. **Right of tenant to acquire title as against landlord.]** A tenant, under no obligation to pay taxes on the demised premises, may acquire valid title to the premises on tax sale during the term, and thereby defeat his landlord's claim for subsequently accruing rent. *Weichselbaum v. Christ* (Kans.), 204.

LARCENY.

See CRIMINAL LAW.

LAWYER.

See ATTORNEY AND CLIENT.

LIBEL.

See SLANDER AND LIBEL.

LICENSE.

See CONSTITUTIONAL LAW, 393.

LIEN.

For services — waiver — agreement on amount.] One with whom materials are left for manufacture has a lien on them for his work ; such lien is not waived by a special agreement for the amount to be paid for the work ; and replevin cannot be maintained for such manufactured materials until payment or tender of the charges. *Mathias v. Sellers* (Penn.), 728.

LIFE INSURANCE.

See INSURANCE.

LIMITATION OF ACTIONS.

1. **Disability — coverture succeeding infancy.]** A statute provided that if any person entitled to maintain ejectment be at the time his title accrued within the age of twenty-one years or *feme covert*, he or she may bring the action within ten years after such disability is removed. *Held*, to extend only to disabilities existing at the time when the right or cause of action first accrues. *Cossens v. Farnan* (Ohio), 470.
2. **—.]** Therefore, where a plaintiff is under the disability of infancy only, when her right of action first accrues, and afterward marries before she becomes of full age, her coverture is not available as a disability within the statute. Her action can be commenced only within ten years after she becomes of full age. *Id.*
3. **Payment by administrator of one joint obligor.]** Part payment upon a bond, by the administrator of one of the obligors before the statute of limitations has run against it, will prevent the running of the statute as to the other obligors. *County of Vernon v. Stewart* (Mo.), 250.

MARINE INSURANCE

See INSURANCE.

MARRIAGE.

1. **Breach of promise of — infancy.]** When pleaded is a good defense to an action for the breach of a promise to marry. *Rush v. Wick* (Ohio), 523.
2. **Requisites to valid contract of.]** In the absence of statutory provision pronouncing such an agreement void, an agreement between parties

MARRIAGE — *Continued.*

to live together as husband and wife, followed by actual cohabitation, is valid, without any magisterial or clerical solemnization. *Dyer v. Brannock* (Mo.), 359.

3. Agency of husband as to wife's separate property.] Defendant, a married woman, executed and deposited with a bank in which she kept an account, a power of attorney authorizing her husband to "make, sign, indorse, and accept all checks, notes, drafts and bills of exchange for her and in her name." She carried on no trade or business, but owned real estate, which she rented. The husband, in exchange for the plaintiff's check payable to his own order, gave them a post-dated check signed by himself in defendant's name, which was dishonored. In an action thereon, *held*, (1) it was for the plaintiff to prove that the transaction was within the agent's powers and for the benefit of the defendant's estate or in her business; (2) the receipt and disposal by a married woman of the rents of her real estate is not the carrying on of a trade or business within the statute authorizing married women to carry on trade or business; (3) the power of attorney did not authorize the husband to create a debt or charge it upon his wife's estate, and the giving such check was not within his authority. *Nash v. Mitchell* (N. Y.), 38.
4. Antenuptial contract when avoided by misrepresentation.] A procured the execution by B, his intended wife, of an agreement by which, in consideration of \$500 to be paid to her if she survived him, she agreed to relinquish all her rights in his property and estate. He represented to her, without reading, and without her reading, the agreement, that she was to receive \$500 in cash, \$500 if she survived him, and the deed of a house and lot. Nothing whatever was ever given her under the agreement. In proceedings after his death, *held*, that the agreement was void, and the widow was entitled to her distributive share in his estate. *Pierce v. Pierce* (N. Y.), 22, and note, 26.
5. —.] Antenuptial agreements are severely scrutinized by the courts, and owing to the confidential relations of the parties, it seems that the presumption is against their validity, and that the burden of proof is upon the husband to prove the perfect fairness of the transaction. *Ib.*
6. Married woman — liability to suit.] Under a statute permitting married women to take, hold and convey property as if unmarried, a married woman cannot be sued on a contract made by her while married and living with her husband. *Stockton v. Farsey* (W. Va.), 566.
7. Note of married woman — surety.] When the note of a married woman is void for coverture, the surety thereon is still liable. *Hicks v. Randolph* (Tenn.), 760.

Devise to husband and wife.] *See* DEVISE, 302.

Fraudulent conveyance.] *See* FRAUD, 726.

See DIVORCE.

MASTER AND SERVANT.

1. **Contract for services — excuse for non-performance — illness.]** The defendants agreed with the plaintiffs, proprietors of a theater, to furnish the "Wachtel Opera Troupe," to give a number of performances in their theater, the receipts to be divided in a specified manner. Wachtel, from whom the company took its name, and by whose name it was known, was the leader and chief attraction, and his connection with the company was the inducement that led the plaintiffs to make the agreement. Wachtel became unable to sing in consequence of illness, and the defendants consequently did not furnish the troupe. In an action for breach of agreement, *held*, that Wachtel's appearance was the principal thing contracted for, and was of the essence of the contract; that plaintiff would not have been bound to accept the services of the company without him; and that his sickness and inability to sing constituted a good excuse for non-performance of the agreement. *Spalding v. Rose* (N. Y.), 7.
 2. **Negligence of superior servant — liability of master.]** The master is liable for an injury to a servant resulting from the negligence of a superior servant, while the latter is discharging the duties of one under his control, to the same extent as if the act causing the injury had been committed by an inferior servant under his directions. *Berea Stone Co. v. Kraft* (Ohio), 510.
- Oral contracts for more than a year.]** See STATUTE OF FRAUDS, 484.

MECHANICS' LIEN.

- Municipal property.]** Unless expressly authorized by statute, a mechanic's lien cannot be enforced against real estate belonging to a municipal corporation, and in public use. *Leonard v. City of Brooklyn* (N. Y.), 80, and note, 88.

MORTGAGE.

- Assumption of, by grantee.]** H. delivered to B., a deed, in blank as to the grantee's name, with recital that the amount of a mortgage on the premises was deducted from the consideration, and that the deed was subject thereto, and a covenant by the grantee to pay it. The grantor having authorized B. to insert any name as grantee, B., with defendant's knowledge and assent, inserted defendant's name, and recorded the deed, agreeing that any profits arising from a sale of the premises should be applied to an indebtedness of B. to the defendant's firm. The defendant afterward conveyed the premises; the plaintiff foreclosed the mortgage without making defendant a party, and a deficiency arising, brought this action to recover upon the covenant. *Held*, that defendant, by consenting to the insertion of his name as grantee, assumed the position and liability of a purchaser from a grantor, and was liable on the covenant, and that the arrangement with B., being collateral, did not affect H. or the plaintiff. *Campbell v. Smith* (N. Y.), 5.

- Assumption of, by grantee.]** See VENDOR AND PURCHASER, 778.

MUNICIPAL CORPORATION.

1. **Liability for tort — damages.]** A municipal corporation is liable in damages for a lawful and authorized act of its agents done in an unauthorized manner, but not for an unlawful or prohibited act, and is not liable in treble damages. *Hunt v. City of Boonville* (Mo.), 299.
2. **Negligence — contractor.]** A city employed a contractor to construct a sewer in one of its streets. By the contract, power was reserved to the city engineer to direct changes in the time and manner of conducting the work and the contractor was held responsible to indemnify the city for any damages it should be subjected to in consequence of his neglect; and the contractor executed a bond to the city for such indemnity. The plaintiff was injured by falling into the excavation, carelessly left unguarded. *Held*, that the city was not liable to the plaintiff therefor. *City of Erie v. Caulkins* (Penn.), 642, and note, 647.
3. **Negligence — excavation at side of alley.]** A religious corporation made an excavation inadequately guarded, at the side of a public alley in a city, for entrance to the basement of their church. The plaintiff fell into it in the dark and was injured, while attempting to cross the alley. *Held*, that the city was liable to him for the injury, although the excavation was not on the travelled portion of the alley. *Niblett v. Nashville* (Tenn.), 755, and note, 757.

Assessments for local improvements.] See ASSESSMENTS; TAXATION.

Enforcement of mechanics' lien against.] See MECHANICS' LIEN, 80.

Liability of school board for negligence.] See NEGLIGENCE, 414.

Tax on express companies.] See CONSTITUTIONAL LAW, 382.

NATIONAL BANKS.

- Liability as bailee for special deposit.]** In accordance with its habit, well known to the directors, a national bank received from a customer some bonds for safe-keeping, and the cashier gave a receipt for them. The bonds subsequently disappeared, but in what manner was not shown, and the president and cashier assured the depositor that she should lose nothing, and the interest was paid her for two years. *Held*, that there was sufficient evidence of gross negligence on the part of the bank to go to the jury, and that the bank was liable for such gross negligence of its officers. *First National Bank v. Graham* (Penn.), 628.

NEGLECT.

1. **Municipal corporation — defect in street — runaway horse.]** The plaintiff's horse took fright, turned over his buggy, and threw it down the embankment of the street upon which he was driving, and thus he was injured. *Held*, that if the city was negligent in constructing the embankment, in not providing it with necessary railing or other means of protection, and in not keeping the street in safe condition, and such negligence was the real cause of the injury (the jury being the judge of these matters as questions of fact), the plaintiff had a cause of action. *City of Atlanta v. Wilson* (Ga.), 396, and note, 398.

NEGLIGENCE — *Continued.*

2. **Board of education — liability for negligence.]** A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability. *Finch v. Board of Education* (Ohio), 414.
 3. **Remote and proximate cause.]** An oil train on defendant's railway was thrown from the track by a recent land slide, and the oil-tanks bursting, the oil became ignited and ran down into an adjoining creek, swollen by recent rains, and flowing down the creek, set fire to and destroyed the plaintiff's buildings three or four hundred feet distant. *Held*, that even if defendants were negligent, the damage was too remote to warrant a recovery. *Hoag v. Lake Shore, etc., R. R. Co.* (Penn.), 653.
 4. **Safe deposit company — evidence.]** A safe deposit company for hire undertook to "keep a constant and adequate guard and watch over and upon the burglar proof-safe," rented by plaintiff, and to protect its contents from dishonesty of the company's employees. Some bonds which the plaintiff had deposited in the safe disappeared. *Held*, that the company was bound to explain their absence. *Safe Deposit Company v. Pollock* (Penn.), 660.
 5. **Excavation on land adjoining highway — trespasser.]** A was making an excavation by contract on the land of B, at a point some eighty feet from the street, and ten or fifteen feet above its grade. A third person having fallen into the excavation at night, and crying for help, C approached to help him, fell into the excavation and was killed. *Held*, that A was not liable therefor. *Gramlich v. Wurst* (Penn.), 684.
 6. **Contractor — coal hole open in sidewalk.]** The owners of a sugar refinery employed a rigger to remove machinery from a railroad car to their refinery. In doing the work the rigger opened a coal hole in the sidewalk, and left it open a few minutes after the work was finished. A lad fell into the hole and was injured. The rigger was paid by the day, and the owners of the refinery neither directed nor interfered with the manner of the work. *Held*, that they were not liable for the injury. *Harrison v. Collins* (Penn.), 699, and note, 702.
- Of carrier — injury to passenger in caboose.]** See CARRIER, 693.
- Of contractor for municipal work.]** See MUNICIPAL CORPORATION, 642.
- Injury from breaking of telegraph pole.]** See TELEGRAPH COMPANY, 10;
See, also, MASTER AND SERVANT; MUNICIPAL CORPORATION; NUISANCE.

NEGOTIABLE INSTRUMENTS.

1. **Implied warranty of genuineness of negotiable instruments.]** One who sells negotiable bonds impliedly warrants their genuineness, and in case they are forged, is liable for the return of the purchase-money, without any offer to return such bonds, and although the vendee has resold the bonds at a greater price. *Smith v. McNair* (Kans.), 117.

NEGOTIABLE INSTRUMENTS — *Continued.*

2. Executed by executor—*descriptio personæ*.] An executor, for an expense connected with his trust, executed a promissory note in the ordinary form, on interest, adding to his signature the words, "executor of," etc. *Held*, that the executor was liable individually, and not in his representative capacity, on the note. *Rittenhouse v. Ammerman* (Mo.), 215.
3. Note of married woman—surety.] When the note of a married woman is void for the coverture, the surety on the note is none the less liable. *Hicks v. Randolph* (Tenn.), 760.
4. Indorsement—parol evidence to vary effect of.] Parol evidence is inadmissible to change a simple indorsement of a promissory note into an indorsement without recourse. *Doolittle v. Ferry* (Kans.), 166.
5. Indorsement after maturity.] One who indorses an overdue note, at request of the maker, in consideration of indulgence by the payee, is liable as a guarantor. *Rivers v. Thomas* (Tenn.), 784.
6. Indorsement by stranger—evidence to define his liability.] When A indorses a note payable to the order of B, at the time it is made, he is *prima facie* liable to B as guarantor or maker, as B may elect; but he may show by extrinsic evidence that his intention was to bind himself only as guarantor or as second indorser, and thus limit his liability. *Burton v. Hansford* (W. Va.), 571, and note, 580.
7. Irregular indorsement—liability upon.] A negotiable promissory note was indorsed by the payee in the usual position. The defendant had previously written his name across the back of the note near the other end, in an inverted position. *Held*, that the defendant was liable as second indorser. *Arnott's Administrator v. Symonds* (Penn.), 630.
8. Discharge of principal discharges surety.] A surety on a promissory note may plead in bar to an action on the note, a judgment discharging the principal on account of the illegality of the note. *Gill v. Morris* (Tenn.), 744.
9. Revival of liability of discharged indorser.] An indorser, whose liability has not been fixed by notice, and who, with knowledge thereof, subsequently either acknowledges his liability or promises to pay the note, is bound by such recognition. *Bogart v. McClung* (Tenn.), 737.
10. Right of accommodation indorser to subrogation.] One who has discounted negotiable paper for the maker cannot be compelled by the accommodation indorser to resort to collaterals belonging to the maker in his hands before resorting to him, although the indorser relied on the collaterals in making such indorsement; although the holder knew of his reliance and that the indorsement was for accommodation; although the proceeds were applied by the holder to payment of other paper of the maker; and although other parties are in the same situation with the indorser. The remedy of the indorser is to pay the paper, and demand and enforce the security. *First National Bank v. Wood* (N. Y.), 66.
11. Waiver of protest of note after dishonor.] Before the maturity of a promissory note the holder and the accommodation indorser had some conversation about extending the time of payment; but no arrangement

NEGOTIABLE INSTRUMENTS — *Continued.*

was made. The note was not presented for payment at maturity. Afterward the holder and the maker went to the indorser to arrange for an extension, the maker then asked the holder if he desired a new note, and he replied that if it was agreed to, he would let the note stand as it was. The indorser said, "then I will waive protest," and the holder thereupon agreed to the extension. *Held*, in an action on the note against the indorser, that this would warrant a finding that the indorser understandingly agreed to continue to be liable, and a nonsuit was erroneous. *Ross v. Hurd* (N. Y.), 1.

Note of non-commercial firm executed by one partner.] *See* PARTNERSHIP, 733; BANKS.

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Negligence of contractor, 702.

Satisfaction of statutory penalties, 723.

Shackles on prisoner in court, 116.

Verdict in absence of prisoner, 394.

Waiver of condition in insurance policy, 597, 607.

NUISANCE.

1. **Eaves-drip — contributory negligence.]** The defendant so constructed and maintained the roof of his building, that the water flowed therefrom upon the wall of plaintiff's adjoining building, and, penetrating it, damaged his goods. *Held*, that the fact that the defendant's wall was so openly and loosely constructed, as easily to admit the water, was no defense to an action for such damages. *Gould v. McKenna* (Penn.), 705.
 2. **Corruption of water-course.]** The plaintiff purchased a tract of land in the coal region, and erected a residence upon it. A leading inducement to the purchase was a pure mountain stream of water running through the land. The plaintiff constructed a pond for fish and ice upon it, and from it supplied a cistern, a ram, and a tank in the attic of his house. Subsequently defendants opened a colliery on the stream two miles above, which corrupted the water and spoiled it for plaintiff's uses, killed fish and shrubbery, corroded the pipes and compelled plaintiff's abandonment of the water. *Held*, that plaintiff had a right of action therefor, and that a nonsuit was erroneous. *Sanderson v. The Pennsylvania Coal Co.* (Penn.), 711.
- Excavation near highway.]** See NEGLIGENCE, 684; MUNICIPAL CORPORATIONS, 755.
- Telegraph pole in street — injury from breaking of.]** See TELEGRAPH COMPANY, 10.

OFFICE.

1. **Officer de facto — payment of salary to, by county.]** County commissioners paid to the county clerk *de facto*, claiming *de jure*, the salary of his office. The title to the office was then in litigation to the knowledge of the commissioners, and the clerk *de facto* was insolvent. *Held*, that the clerk *de jure*, whose title was affirmed, had no cause of action against the county commissioners for such salary. *Commissioners of Saline County v. Anderson* (Kans.), 171.
2. **Officers de jure, when entitled to salary.]** A city physician was duly elected, but was prevented by injunction at the suit of the prior incumbent, from taking possession of the office, and the latter drew the salary for some months thereafter. The injunction having been set aside, *held*, that the former was entitled to recover salary for that period from the city. *Memphis v. Woodward* (Tenn.), 750, and note, 754.
3. **Vacancy in constitutional law.]** The Constitution of Missouri authorizes judges to hold office during a fixed term, and until their "successors" are "elected and qualified." In case of a "vacancy" by death, the governor is to order a new election. A, a judge, was elected for a term expiring on the first Monday of January, 1875. In November, 1874, B was elected as his successor, was duly sworn, and was a person qualified for the office, but two days before the commencement of his term he died. *Held*, that A's right to hold over ceased with B's qualification and did not revive with his death, and that a new election was authorized. *State ex rel. Attorney-General v. Seay* (Mo.), 206.

PARDON.

Revocation.] A pardon, properly attested, authenticated, and delivered, is irrevocable; delivery to the person suing for it is effectual; and it is not void although not registered in the office of the secretary of State, where all official acts of the governor are required by law to be registered. *Ex parte Reno* (Mo.), 837

PARENT AND CHILD.

See INFANCY.

PARTNERSHIP.

1. **Dower in partnership real estate.]** A partnership bought and improved lands with the partnership funds, and held and treated them as partnership property. The title was taken in the individual names of the partners. One of the partners died, and the firm being insolvent, the lands were sold to pay the firm debts. *Held*, that the widow of the deceased partner was not entitled to dower in such lands. *Willet v. Brown* (Mo.), 265, and note, 370.
2. **Assumption by one partner of debts and pledge of property for his own debt.]** A partner in an insolvent firm sold his interest to his copartner, who assumed the firm debts. The latter deeded all the firm property to secure a debt of his own accruing previous to the dissolution. *Held*, that a creditor of the firm was entitled to payment out of such property before the individual creditor, and as to the firm creditor such deed was void. *Phelps v. McNeely* (Mo.), 878.
3. **Rights of creditors after dissolution and assumption of obligations by a portion of firm.]** One partner retired from the firm, selling his interest to the remaining partner, he agreeing to pay the firm debts, and having sufficient property to do so. That property having been wasted, a firm creditor, being unable to enforce his claim, filed a bill to reach property which the outgoing partner had withdrawn from the firm when he retired. *Held*, that he had no equitable lien thereon. *Hollis v. Staley* (Tenn.), 759.
4. **Rights of creditors as to partner assuming partnership liabilities.]** A retiring partner remains liable for all the existing debts of the firm, to the same extent as if he had not retired. An agreement between him and the remaining partners, or with the new firm that succeeds, that they will assume and pay all such debts, while valid as between the partners, has no effect upon the creditors of the old firm, unless they become parties thereto. *Rawson v. Taylor* (Ohio), 464.
5. **—.]** R. held the promissory note of the firm of T. G. & Co. After it was given, some members of the firm retired, leaving assets sufficient to pay all debts, and taking the obligation of the succeeding new firm, to pay all debts and save the retiring partners harmless. *Held*, that unless R., by some valid contract, express or implied, had made himself a party to this new arrangement, or had so acted as to be estopped, his rights on the note against all the members of the old firm remained unchanged; that while, as between the partners themselves, the relation of principal and surety

PARTNERSHIP — *Continued.*

existed, yet, as to the payee of the note, all were principals and joint debtors, although notice of such obligation was brought home to him. *Id.*

6. —.] Where the payee of such note has received from the new firm a chattel mortgage of the partnership property sufficient, if applied, to satisfy the debt, he may, with the assent of the retiring partners, release the mortgage, and return the property or its avails to the new firm, without impairing his rights against all the joint obligors on the note, even though he had notice of the subsequent contract between the partners. *Id.*
7. Non-commercial — negotiable paper.] A member of a publishing partnership executed his note for his individual debt and indorsed it in the firm name to a *bona fide* holder. *Held*, that the firm were not *prima facie* liable upon it. *Pooley v. Whitmore* (Tenn.), 733.
8. Surviving partner as receiver — compensation.] A surviving partner, appointed receiver of the partnership affairs at his own instance, is not entitled to compensation as such receiver. *Barry v. Jones* (Tenn.), 742.
9. Notice of dissolution.] Notice of dissolution of a partnership was published in a newspaper, and a copy thereof, with a red line drawn about the notice, was mailed to an actual dealer residing in another place. *Held*, not alone sufficient to charge such dealer with notice. *Haynes v. Carter* (Tenn.), 747.

Exemption of assets from execution.] *See* EXEMPTIONS, 244.

Transfer from one partner to another.] *See* INSURANCE, 60.

PAYMENT.

Procuring check to be certified.] Where the holder of a check procures it to be certified, this operates as a payment of the debt for which the check was drawn and the drawer is released from liability. *French v. Irwin* (Tenn.), 769.

PRINCIPAL AND SURETY.

See SURETY.

PROBATE COURTS.

See JURISDICTION, 276.

PROMISSORY NOTE.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See NEGOTIABLE INSTRUMENTS.

QUO WARRANTO.

See CONSTITUTIONAL LAW, 263.

RAILROAD.

Encroachment — telegraph line on — right of way.] In order to construct a telegraph line along its route for its own use, a railroad company may cut down trees standing on its way, without incurring any additional liability to the original owner of the land for compensation; and if such telegraph line is constructed by the railroad company and another for their joint use, the latter, and the latter alone, is liable to such land-owner for the additional damage to the land by the use of the telegraph line. *Western Union Telegraph Co. v. Rich* (Kans.), 159.

See CARRIER; NEGLIGENCE.

RATIFICATION.

See INFANCY, 496.

RECEIVER.

See PARTNERSHIP.

REMOVAL OF CAUSE.

Colored prisoner — jury from which colored persons are excluded.] A colored man cannot remove an indictment against him into the Federal court for trial, upon the allegations that such prejudices exist against his race in the State that justice will not be done him, and that none but white men can there sit on the jury. *State v. Strauder* (W. Va.), 606.

SAFE DEPOSIT COMPANY.

See NEGLIGENCE, 660.

SALE.

I. Implied warranty on sale of garden seeds — measure of damages — evidence — declaration of agent.] The defendants, a corporation, were growers of garden seeds for sale, and the plaintiffs, to the knowledge of defendants, were market gardeners, who raised vegetables for sale. In 1867 the plaintiffs bought of the defendants large Bristol cabbage seed, which produced Bristol cabbage. In the fall of 1867, Miller, one of defendant's trustees, informed plaintiffs that defendants had that year raised the same kind of seed, and solicited them to purchase. In February, 1868, plaintiffs applied to defendants for seed, and the defendants exhibited a catalogue of the seed they had for sale, among which was large Bristol cabbage seed. The plaintiffs then ordered some of that seed, with other, and the seed was delivered to them, the cabbage seed being billed "large Bristol cabbage seed." The seed thus sold had been raised upon Bristol cabbage stocks, which were in the vicinity of other varieties of cabbage, and were fertilized by the pollen therefrom, and consequently the seed in question became impure and lost the character and quality of Bristol cabbage seed, and the plants raised by the plaintiffs therefrom were of no known variety, and of no value except for fodder. In an action for damages, *held*, that the defendants warranted the seed to be Bristol cabbage seed; that there was an implied warranty that the seed had been

SALE — *Continued.*

- properly raised; and that the proper measure of damages was the difference in value between the crop raised and a crop of Bristol cabbage of that year. *Whits v. Miller* (N. Y.), 18.
2. Interest on damages.] In an action for damages for breach of warranty for seed, interest on the damages from the time when the crop would have been harvested and sold, cannot be recovered. *Id.*
3. Evidence — declarations of agent.] In an action of damages for breach of warranty for sale of a chattel, declarations of the vendor's agent, eight months after the sale, and not connected with any present business transaction, that the chattel was defective, are inadmissible in evidence. *Id.*
4. Title — delivery.] Title to personal property passes by delivery, although there remains something to be done to ascertain the value at the agreed rates, unless by the terms of the contract of sale this was to be done before delivery. *Burrows v. Whitaker* (N. Y.), 42.
5. —.] Defendant agreed to buy of plaintiff all the lumber he should deliver at a specified place on D. river, before a certain time; and prices were agreed on for the good and for the culled. Defendant was to cull and pile, and the lumber was to be counted on the bank or estimated in the raft at that place. The delivery was commenced, and a portion was culled and piled, but before it could be counted or estimated it was carried away by a freshet. In an action to recover the contract price of the amount so delivered, *held*, (1) that the evidence sustained a finding of delivery and acceptance; (2) that delivery of the whole amount contracted for was not necessary to pass title to that delivered. *Id.*
6. Warranty condition precedent.] Upon a sale of a machine, with written warranty, and a provision that in case of failure of the machine to answer the purpose, the warrantors were to have notice "at once," in order that they might cause it to work well, or furnish another that would work well. Such notice is a condition precedent to an action for breach of the warranty. *Lewis v. Hubbard* (Tenn.), 775.
- Insolvency of purchaser — when evidence of fraud.] *See* CONTRACT, 501.
- To agent — undisclosed principal.] *See* AGENCY, 51.

SEAL.

See GIFT.

SCHOOL.

- Powers of school directors to make rules — malice.] Under a statute authorizing school directors to make and enforce all needful rules and regulations for the government, management and control of the schools, not inconsistent with the laws of the land, school directors made a rule that no pupil should, during the school term, attend a social party, and expelled the plaintiff for a violation of that rule by permission of his parents. In an action for damages for such expulsion, *held*, that the directors had exceeded their powers, but inasmuch as there was no malice, willfulness or oppression, they were not liable. *Dritt v. Snodgrass* (Mo.), 243.

SLANDER AND LIBEL.

1. **Justification in civil action.]** The Constitution of Kansas provides that : "The liberty of the press shall be inviolate ; and all persons may freely speak, write or publish their sentiments on all subjects, being responsible for the abuse of such right ; and in all civil or criminal action for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libellous matter was published for justifiable ends, the accused party shall be acquitted." In a civil action against the proprietor of a newspaper for libel, where the defendant justified, the court charged that proof of the truth of the words in question was not a defense, but only went to mitigate damages, and that the defendant must also show that he published the words with good motives and for justifiable ends, and that if he acted honestly, for good purposes, and for justifiable ends, he was to be excused. *Held*, error. The truth of the matter charged is a complete justification. *Castle v. Houston* (Kans.), 137.
2. **Justification of libel, when ground of action.]** An action will not lie for statements contained in an answer alleged to be libellous, if such statements were honestly made, without malice, and if they were relevant, believed by defendant to be true, and were made upon probable cause, and under advice of counsel. *Lanning v. Christie* (Ohio), 431.
3. **Corporation.]** A publishing corporation is liable to an action for libel. *Johnson v. St. Louis Dispatch Co.* (Mo.), 298.
4. **What is.]** One published of another that he disgraced an office which he had filled ; that he had been accused of horse-stealing, had sued his accusers and the defendants had a verdict. *Held*, that this imputed the crime of grand larceny. *Ib*.
5. **Damages — counsel fees.]** In an action for libel, the jury may, in estimating compensatory damages, allow to the plaintiff reasonable counsel fees in the prosecution of his action, although there may be circumstances of mitigation, not amounting to a justification. *Finney v. Smith* (Ohio), 524, and note, 528.

STATUTE OF FRAUDS.

1. **Action to recover money paid on contract void under.]** An action will not lie to recover the consideration paid upon an oral agreement for the purchase of lands, if the vendor is willing to fulfill. *Galwey v. Shields* (Mo.), 351.
2. **Verbal contract for work for more than a year — completed.]** Although an action cannot be maintained upon a verbal contract not to be performed within one year, yet when such contract has been fully performed by one party, the other having obtained its benefits, he cannot refuse to pay the reasonable value thereof. *Twissley v. Moore* (Ohio), 434.
3. **—.]** T. agreed to work until coming of age, a period of six years or more, for M. Having performed the contract, T. may maintain an action of *quantum meruit* for his services. *Ib*.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS, 250.

STATUTORY CONSTRUCTION.

Penalty — satisfaction.] A statute imposed a penalty on any railroad company which should exclude any person or persons from any particular car on account of race or color, and subjected the employees offending to fine and imprisonment. A man and his wife, colored persons, were excluded from a car by the same employee at the same time. *Held*, but a single offense, and that a recovery by the man and his wife in right of the wife barred a recovery in his own right. *Central Railroad v. Green* (Penn.), 718, and note, 722.

SUBROGATION.

Right of accommodation indorser to.] See NEGOTIABLE INSTRUMENTS, 66.

SUICIDE.

See INSURANCE, 689.

SURETY.

1. **For one non sui juris.]** A surety on an obligation void for coverture is liable. *Hicks v. Randolph* (Tenn.), 760.
2. **Bond—signature of co-surety forged.]** The defendant signed an official bond as surety, on the representation that another surety, whose signature appeared thereon, had actually signed it. That signature was a forgery, and the person whose name had been forged did not communicate the fact to the defendant. The obligee was ignorant of the condition on which the defendant had signed. *Held*, that the defendant was liable. *State ex rel. Brown v. Baker* (Mo.), 214.
3. **Discharge of principal.]** A surety on a promissory note may plead in bar to an action on a note a judgment discharging the principal on account of the illegality of the note. *Gill v. Morris* (Tenn.), 744.
4. **Laches of principal.]** The agent of a corporation, being under bond to account and pay over daily, cannot be trusted with more money at his surety's risk after dishonesty of the agent is discovered by the corporation. But he may be so trusted, so long as the circumstances, fairly interpreted, point, not to moral turpitude, but to a want of diligence or punctuality rather than to a want of integrity. *Charlotte, Columbia, etc., R. R. Co. v. Gow* (Ga.), 403.
5. **Effect on, of usurious agreement for delay between principal and creditor.]** A surety is not discharged by an executed usurious agreement for delay, between the principal debtor and the creditor, although made without the surety's knowledge or assent. *Howell v. Sevier* (Tenn.), 771.

TAXATION.

1. **Farming lands added to city — lack of benefit.]** The limits of a city were extended by legislative enactment so as to embrace farming lands. The lands were taxed for municipal purposes, some of which afforded no benefit or protection to them. *Held*, a constitutional tax. *Kelly v. Pittsburgh* (Penn.), 683.

TAXATION — *Continued.*

2. **Exempt property — churches.]** Under a statute exempting from taxation "churches, meeting-houses, or other regular places of stated worship," "in actual use and occupation for the purpose aforesaid," the land on which a church is in process of erection is not exempt. *Mullen v. Commissioners* (Penn.), 650.
3. **Injunction against collection of illegal tax.]** Equity will not enjoin the collection of an illegal tax, in the absence of special circumstances, as for example to prevent multiplicity of suits, or irreparable injury, or cloud upon title. *Douglass v. Town of Harrisville* (W. Va.), 548.

For local improvements.] See ASSESSMENTS.

Municipal power of.] See CONSTITUTIONAL LAW, 382.

Of steamboats.] See CONSTITUTIONAL LAW, 552.

Uniformity of.] See CONSTITUTIONAL LAW, 101.

TELEGRAPH.

1. **Liability for injury by breaking of pole.]** A telegraph company, having a right to place its line in a public street, is bound only to reasonable care; can be made responsible for an injury occurring from the breaking of one of its poles, only by proof of culpable negligence in the construction or maintenance of the line; and is not bound so to construct or maintain the line as to guard against storms of unusual severity, the occurrence of which could not reasonably be expected. *Ward v. Atlantic and Pacific Telegraph Co.* (N. Y.), 10.
2. **Negligence — damages.]** In case of a failure to deliver a telegraphic message, the company is only liable for such damages as naturally flow from the breach of contract, or such as may fairly be supposed to have been within the contemplation of the parties, at the time the contract was made. *First National Bank v. Telegraph Co.* (Ohio), 485.
3. **Intervening cause.]** If the telegraph company is in default, but their default is made mischievous to a plaintiff only by the operation of some other intervening cause, such as the dishonesty of a third person, the rule "*causa proxima non remota spectatur*" applies, and the company cannot be made responsible for the loss occasioned by the act of such third person. *Ib.*

Erection of.] See RAILROAD, 159.

TRIAL.

See CRIMINAL LAW.

VENDOR AND PURCHASER.

Assumption by grantee of lien on premises.] A owned land under a deed on its face subject to a lien for unpaid purchase-money. He conveyed to B an undivided fourth interest thereof, with warranty, B assuming in consideration thereof to pay one-fourth of the lien debt. By agreement between A and his grantors, the amount of the lien debt was reduced to

VENDOR AND PURCHASER — *Continued.*

a sum less than that due from B, no part of which had been paid, and the land was sold to satisfy the lien. *Held*, that B was not entitled to any recovery on the warranty; that he was entitled to share in the reduction of the lien debt, and liable to A for one-fourth thereof as reduced. *Sagder v. Summers* (Tenn.), 778.

Assumption of mortgage by purchaser.] *See* MORTGAGE, 5.
See EASEMENT, 35; FIXTURES.

VOLUNTARY CONVEYANCE.

See GIFT.

WARRANT.

See COUNTY WARRANTS, 26.

WARRANTY.

Implied on sale of negotiable instruments.] *See* NEGOTIABLE INSTRUMENTS, 117.

See SALE.

WATER.

Corruption of.] *See* NUISANCE, 711.

WATER-COURSE

Boundary by.] *See* Deed, 789.

WILL.

1. Bequest for religious use — uncertainty.] A testator makes a bequest in trust for the benefit of his parents during their lives, and proceeds: "It is my will and desire that upon the death of both of my said parents the trust shall expire, and my said trustees shall distribute the funds as follows, to wit: As to the remaining sum of three thousand dollars, the balance of said trust fund, my said trustee is directed to apply the same so that it may be used for the interests of religion, and for the advancement of the kingdom of Christ in the world, as follows, to wit: "He shall pay to the treasurer of the American Tract Society the sum of one thousand dollars; to the treasurer of the American Bible Society the sum of five hundred dollars; to the treasurer of the society known as the American and Foreign Christian Union the sum of five hundred dollars, and to the treasurer of the American Home Missionary the sum of one thousand dollars." *Held*, 1. The trust created by the will ceases upon the death of the parents, and payment of the money to the societies whose treasurers are named 2. The societies are the beneficiaries of the will, and the bequest is not void for uncertainty. 3. The object of the testator being to advance Christ's kingdom, the societies named are specified as the means by which to accomplish his object. 4. An unincorporated society is capable of receiving a bequest of personalty, not amounting to a trust. *American Tract Society v. Atwater* (Ohio), 422.

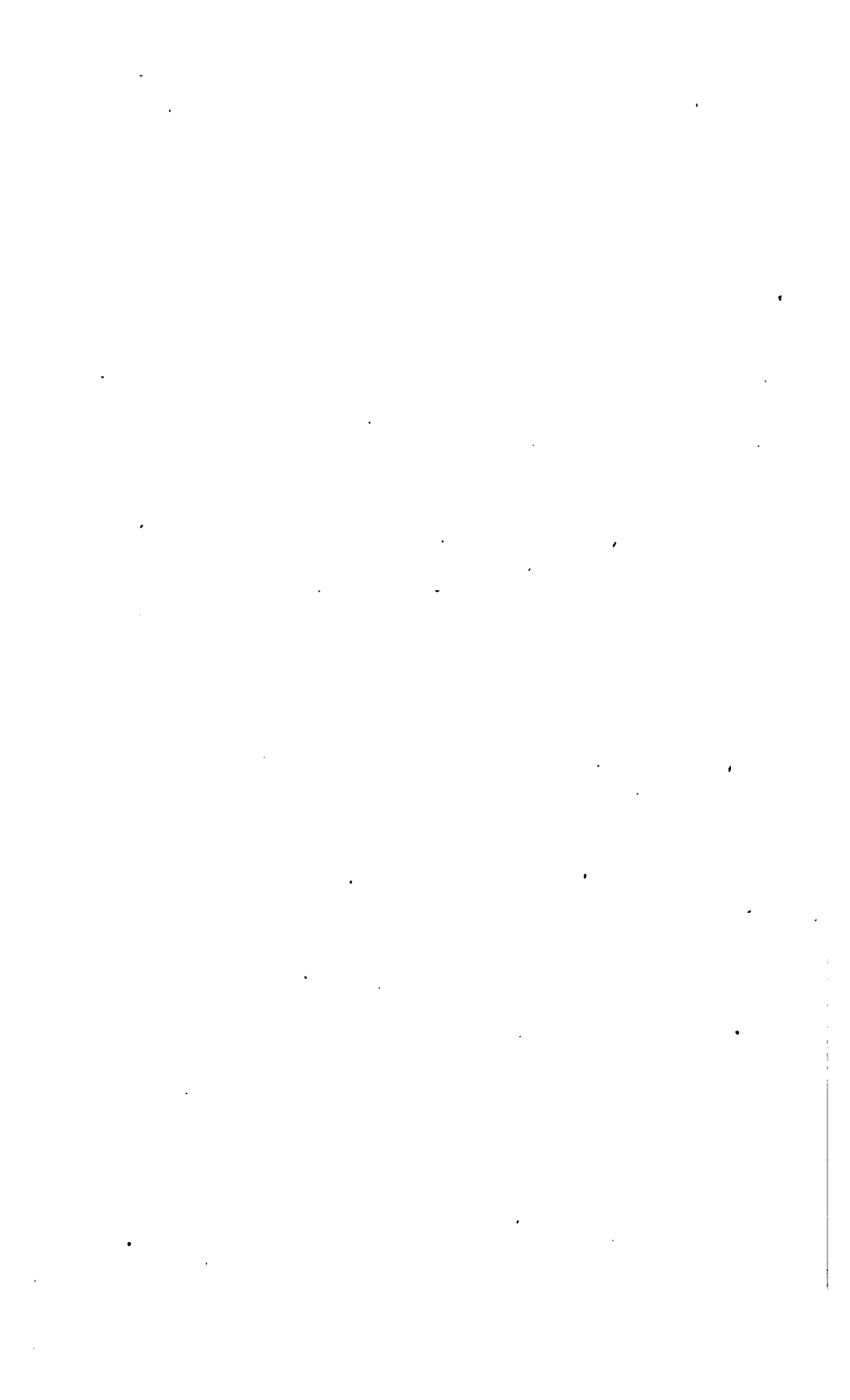
WILL — *Continued.*

- 2. Construction — "heirs" — limitation by subsequent clause.]** A testator devised land to his children and their "heirs," by separate clauses. By a subsequent clause, he declared that none of his children should have a right to sell or incumber the lands, but "the lands shall remain free for their children or heirs, and they, my said children, shall have the use, income and profit of the said lands and farms during their life-time." By still later clause, he gave them the power to dispose of their interests "by will as aforesaid." *Held*, that the testator's children took but life estates. *Urich's Appeal* (Penn.), 707.

See DEVISE.

WORDS.

- "Dwelling-house." *See CRIMINAL LAW*, 87.
 "Family." *See EXEMPTIONS*, 401.
 "Heirs." *See WILL*, 707.



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